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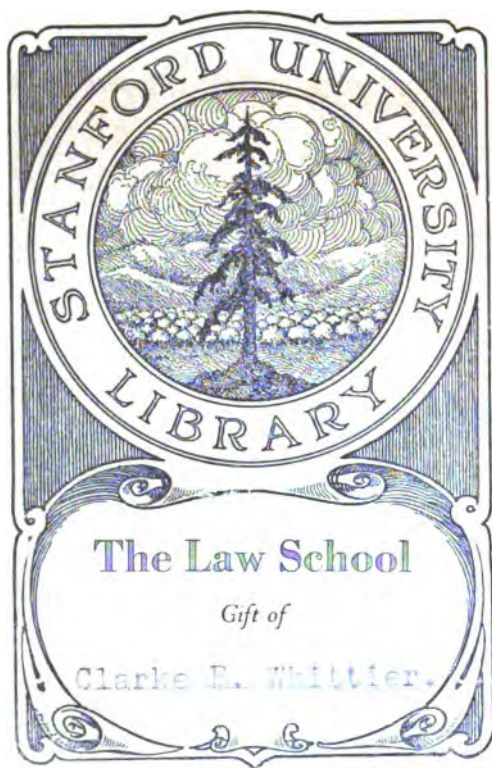
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OF  
The Law of Actions and Trials

AT

**Rifi Prius.**

THE SECOND EDITION, CORRECTED,

WITH CONSIDERABLE ADDITIONS FROM PRINTED AND  
MANUSCRIPT CASES,

And Three New Chapters

ON THE LAW OF CORPORATIONS AND EVIDENCE.

BY

ISAAC 'ESPINASSE,

OF GRAY'S INN, ESQ. BARRISTER AT LAW,

*Et Spes et ratio Studiorum.* Juv.

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YRABEL GROMATZ



TO

THE RIGHT HONOURABLE

LLOYD LORD KENYON,

BARON OF GREDINGTON,

IN THE COUNTY OF FLINT,

LORD CHIEF JUSTICE OF ENGLAND,

THE FOLLOWING WORK

IS

(WITH MUCH DEFERENCE AND RESPECT)

INSCRIBED.



## P R E F A C E.

**W**HEN the Profession have long been in possession of a Work of established Reputation, sanctioned with the name of an Author high in situation, and still more eminent for talents and great legal information, some account may perhaps be deemed necessary of the motives which have induced me to obtrude on their attention the following Publication. In detailing these motives, it is impossible to avoid observation on what appear to me to be the defects of that work. Nothing but an attempt to correct these defects, and to submit to the World another Publication, aiming at least at improvement, can justify this claim to public attention. In pointing out, however, those defects, it is very far from my intention to depreciate the labours of the learned Author who has preceded me. I can separate a very high personal respect, from that which I bestow on a work given to the world, though sanctioned with his name: I can, in common with the rest of my profession, do the ample justice of unlimited admiration to the great discriminating powers of that learned Judge, and to that great extent of legal accuracy and learning which marks his opinion on every question of importance which comes before the court,—while I look in vain for those marks of superior powers in the Introduction to the Law of Trials at *Nisi Prius*.

But as talents very inferior may improve on the labours of those who have preceded them: as in this country, he who has directed his studies to pursuits, in any manner useful to the Public has never failed of his reward, I feel a confidence that the following Work will be deemed an honourable effort in profession, evidence at least of one essential requisite in a Lawyer,—professional attention and assiduity.

Before the publication of the Introduction to the Law of Trials at *Nisi Prius* by Mr. Justice Buller, there was no regular work on that subject: It was only to be collected from detached Treatises on the different Actions. By this learned Author were these different heads first collected and published, with the addition of several Manuscript Cases, highly useful to the Profession. And though in the Preface to the last Edition, the learned Author mentions his Book but as a *Vade Mecum* for the Circuit, it was certainly used by the younger part of the Profession for a very different purpose: it was used by them as an Elementary Book on the Law of *Nisi Prius*, as a necessary Volume of preparatory legal information. With this view I first consulted it. Used from long and early pursuits at the University, to method, to order, and arrangement, as necessary to the clear and accurate conception of any object of study, the glaring defect of the Law of *Nisi Prius* in this respect could not fail to strike me. On subjects wherein nice and subtle distinctions abound, wherein discrimination forms a very leading feature in professional ingenuity, if the several cases on the same head are dispersed in different parts of the Volume, and not placed in a regular or contrasted point of view, these distinctions are

are easily lost. If considered as a *Vade Mecum* for the Circuit, or merely as a Book of Reference, this objection is equally strong: cases on the same point to be searched for in different places, are found with difficulty, and are but ill suited to the facility of finding required in a Book of Reference, often necessary to be consulted during the hurry of a trial.

This objection might alone, perhaps, justify an attempt to amend it; but a closer attention pointed out another considerable defect in that work. Most of the Cases, since the beginning of the Reign of George the II<sup>d</sup>. are given, *as of the term in which they were decided*. These Cases are found, with very few exceptions, in Strange, Burrow, or in those other excellent Reporters which the present reign has produced: And though they derived additional authority from being recognized by the learned Judge, by his having admitted them into a Work to which his Name is prefixed, yet they would certainly be more useful to the Profession, who might have occasion to refer to them, to find them in the Reporters, where they are more at large, than in the abridged form they assume in the *Law of Nisi Prius*.

Such were the objections to the form in which that work was given to the World; but it may, perhaps, be considered as a more serious objection, that several very material heads of the Law are totally omitted. The Law of Policies of Insurance, a part of the Law of great extent and importance, is not touched on at all: The Law of Bills

of Bills of Exchange and of Bankruptcy, very imperfectly: and not a Case is to be found in the whole Volume on the head of Toll, Fishery, Consignment, and many other heads, which I have given in the Chapters of Trespass and Case. These omissions I have attempted to supply; and have availed myself of the valuable Collections of Mr. Cooke, Mr. Park, and other Gentlemen who have published on the different Subjects of the Heads I have mentioned.

With respect to the method which I have adopted, the approbation or censure which it may meet with, can neither be obtained or averted by any observation I can make. A great and liberal profession know its difficulties, and will allow for its defects. When I first gave it to the world, I risked its success under every disadvantage. With a name unknown but in the Circle of that Society of which I am a Member, I offered it to the world as an arranged Collection of Cases on the most important part of the Law, that which is subject of daily litigation, and in which every individual of society has a degree of interest. I owe to liberality a debt of gratitude: its success has far exceeded its merits.

To collect cases under any head of the law, without respect to principles or arrangement, is a matter of no difficulty; but cases deciding no principle are useless: reports are valuable only as furnishing these principles as authorities to direct the profession in future. With this view, I was induced to attempt to extract principles from cases



cases where they were not obvious. These principles I have distinguished by inverted commas; by this means it is easy to ascertain whether the conclusions are warranted by the cases or not, as in such case I have always given them at length.

References to the reporters merely by the page, are liable in the printing to considerable incorrectness. I have endeavoured to obviate this, by always giving the *name of the case*, which is easily found by the Index to the reporter.

In compiling cases so different in subject, dispersed in such a variety of volumes, often obscure and complicated, I am sensible that error is scarcely avoidable. As this Work was originally undertaken only with a view to my improvement, as part of my professional studies; as it was not written with a view to profit, or pressed into light by the urgency of a bookseller,—I have endeavoured to render it as correct as time and care could make it: the cases are fully compiled, nor am I aware that one is omitted from the modern reporters, or which is to be found in the Introduction to the Law of *Nisi Prius*. In that work little attention has been paid to the embodying in the subsequent editions, the cases decided down to the periods in which the several editions of it have appeared. In giving these decisions, I conceive much of the utility of a Publication of this sort depends; and to that I have directed my greatest attention.

With respect to the manuscript cases contained in this Edition, as they can derive no authority from my name, I think  
it

it therefore incumbent on me to inform the profession of the source from whence I derived them; great part of them were contained in a note-book which was lent to me by a very respectable Member of the profession, as having formerly belonged to a learned Judge, who, before his promotion to the Bench, was eminent as a Special Pleader, and transcribed by his pupils for their own use, by his permission.

In all the other cases which have occurred within the period of the last five years, and in which I have given the several points ruled at *Nisi Prius*, I have either myself been of Counsel, or I have taken the note in court; for their accuracy, therefore I can answer.

To compile a work containing a full collection of the decided cases on the several branches of the law as it occurs on trials at *Nisi Prius*, must be of considerable use and importance, particularly on circuit. This Collection I have laboured to render as complete as possible; the liberality of the profession, will, in the difficulty of the undertaking, find much excuse for fault, and suffer it to atone for its defects.

Gray's Inn, March 22, 1793.

GENERAL

## GENERAL INTRODUCTION.

**A**CTIONS at *Nisi Prius* are the different modes of redress which the law has given; where, by the verdict of a jury, the party injured recovers damages proportioned to the injuries he has sustained.

These damages arise either from the breach of any *contract* which the parties have entered into, or from the commission of some positive *injury or wrong* unconnected with any contract or agreement whatever.

Actions at *Nisi Prius* are therefore reducible to the two heads of Actions founded on Contracts, or on Torts or Wrongs.

Actions founded on contracts are either on *simple contracts*, as verbal agreements, notes, or contracts unsealed; or on *special contracts*, as deeds, instruments under seal, recognizances, or judgments.

These form the actions of, 1st, Assumpsit: 2dly, Debt: 3dly, Covenant.—The first on simple, the two latter on special contracts.

Actions founded on torts or wrongs, constitute what are termed Actions of *Trespass*.

Trespass is either *vi et armis*, or *on the case*; that is, where the Trespass is *immediately injurious*, and accompanied

## GENERAL INTRODUCTION.

panied with some degree of force or violence, or where it is unaccompanied with force, *and in its consequences only injurious.*

Both species of actions may be divided into actions of Trespas, as they respect, 1<sup>st</sup>, The Person: 2<sup>dly</sup>, Personal Property: 3<sup>dly</sup>, Real Property, or Chattels Real.

Trespas *vi et armis* therefore is divisible into the actions of, 1<sup>st</sup>, Assault and Battery: 2<sup>dly</sup>, False Imprisonment: 3<sup>dly</sup>, Adultery—or Trespas considered with reference to the *person*: 4<sup>thly</sup>, Replevin: 5<sup>thly</sup>, *Trespas*, properly so called—or Trespas with respect to *personal property*: and 6<sup>thly</sup>, Ejectment—or Trespas with reference to *real property*.

Trespas on the Case is in like manner divisible into, 1<sup>st</sup>, Slander: 2<sup>dly</sup>, Malicious Prosecution --or case considered with reference to the person: 3<sup>dly</sup> *Trover*,—or case considered with reference to personal property: 4<sup>thly</sup>, Trespas on the Case, properly so called, which takes in injuries to real property.

Of each of these I shall treat in their Order.

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## CHAPTER





## CHAPTER I.

# The Action of Assumpsit.

**A**SSUMPSIT is an action whereby damages are recovered for the breach of any promise, contract, or undertaking.

These contracts are either express or implied: both are equally grounds of this action; for the obligations of natural justice are equally strong as the most express promise in the eye of the law.

*Assumpsit* is of two sorts: 1st. *Indebitatus assumpsit*, which Slade's case, in its nature is an action of debt, and lies in cases only 4 Co. 92. where debt would lie: for in *indebitatus assumpsit* the plaintiff recovers not only damages for the special loss, if any, Id. 4 Ref. but to the amount of the whole debt; and therefore a recovery in this action would be a good bar to an action of debt brought upon the same contract. 4 Co. 94. b. 2d. A special *assumpsit*, in which the damages are not in the nature of a debt, but as a compensation for injury.

In treating of this action I shall consider it, 1st, On the ground of the contract itself: 2dly, As the contract has reference to the person: 3dly, The pleadings and evidence: 4thly, The verdict and judgment.

### I. OF ASSUMPSIT CONSIDERED WITH REFERENCE TO THE CONTRACT.

Under this head may be considered: 1st, On what contracts this action may be maintained: 2dly, On what contracts it cannot be supported. And,

#### 1. ON WHAT CONTRACTS IT MAY BE MAINTAINED.

These contracts are either implied or express.

##### I. OF IMPLIED CONTRACTS.

*Assumpsit* being in its nature an equitable action, it is a general description of all cases wherein it lies, that the defendant is obliged by ties of natural equity and justice to refund money which he may have received of the plaintiff's, or to pay it, if the plaintiff has a legal right to demand the same. It lies therefore,

B

“ 1st,

Per Lord Mansfield.  
2 Burr. 1012.

Ibid.

" 1. To recover back money paid under a *mistake*, or  
 " through the *deceit* of the other party."

As if an underwriter pay money on an insurance of a ship supposed to be lost, which afterwards arrives safe, he shall recover back the money so paid. 2 Burr. 1010.

Bize v. Dickson.

Aff. of Barton.

Shlag. 1 Term.

Rep. 281.

Grove v. Dubois.

12. 112. S. P.

So where the plaintiff was a broker with a commission *del credere*, and the bankrupt had been an underwriter, and had underwritten policies to a large amount for the plaintiff for his foreign correspondents; losses to the amount of 661*l.* had happened on those policies, and the plaintiff had paid them to his correspondents in consequence of the *del credere*, and the bankrupt was therefore indebted to the amount of these losses to the plaintiff, and the plaintiff was by him made debtor for the premiums: at the time of the bankruptcy the plaintiff was indebted to the bankrupt in 1356*l.* the whole of which sum he paid to the assignees of the bankrupt, not knowing that he was intitled to hold the amount of the debt due to him, as a set off under stat. 5 Geo. 2. 30, sect. 28; afterwards discovering his mistake, he brought this action for the 661*l.* which he was intitled to have retained, and recovered it.

Haffes v. Wallis.

Salk. 28.

So where the plaintiff, being a feme sole, married the defendant *Wallis*, who was in truth married to another woman, he made leases of her land, and received the rents from the tenants. The plaintiff afterwards discovering the *deceit*, brought *indebitatus assumpsit* against him for the rents so received and recovered.

2 Burr. 1012.

" 2. To recover money paid for a consideration which  
 " happens to fail."

Shove v. Webb.

1 Term. Rep.

732.

As where the plaintiff had paid to the defendant a sum of money for an annuity, the memorial of which not having been duly registered in pursuance of stat. 17 Geo. 3, 26. (for which informality the annuity is made void by the statute) it had been set aside by the Court of Common Pleas; the plaintiff (the grantee) was allowed to recover back the consideration-money so paid by this action for money had and received, the consideration for which it had been paid having failed.

Stratton v.

Rastall.

2 Term. Rep.

366.

But where the defendant had joined the person who sold the annuity to the plaintiff merely as a security, but in reality never had received any part of the money, though he had signed with the other the receipt for the purchase-money, and the annuity was void under the statute, not having been registered, it was adjudged that the defendant was not liable; for the plaintiff had no equity on his side, the defendant having received no part of the purchase-money.

So

So where the plaintiff paid money to the defendant, on the defendant's promise to make him a lease of land, and before the lease made the defendant was evicted, the plaintiff recovered his money by this action, the consideration not having been performed. Brigg's case.  
Palm. 364.

" 3. To recover back money paid to any one acting under or in pursuance of a void authority." 2 Barr. 1102.

As where the defendant being really indebted to the plaintiff, one Davis forged a power of attorney, and empowered an attorney of the name of Hodgson to bring an action in the name of the plaintiff against the defendant; the action was brought in the Court of Common Pleas, and the defendant paid the money into court, which Hodgson took out and paid it over to Davis, who then absconded. On the plaintiff's bringing his action for the money, it was adjudged that the payment so made could be no payment to the plaintiff, but that the defendant was still liable to him, though the defendant might have his remedy against the attorney, who had received the money under a void authority. Robson v.  
Eaton.  
1 Term Rep. 59.

So where H. having letters of administration, appointed the defendant his attorney to receive money owing to the intestate, who received the same, and paid it over to the administrator: afterwards a will appearing, the letters of administration were called in by citation and repealed, and the executor now brought *indeb. assumpsit* against the defendant for the money so received and held well to lie; for the administration was void, and the attorney acted without any authority, and so an implied contract was raised, and the defendant chargeable. Jacob & Allen.  
1 Salk. 27.

" But without impeaching the rule, that money paid under a void authority may be recovered back again by this action, the authority of the last case may be questioned, as that shall not be deemed a void authority which is given by a court having competent jurisdiction."

For where the defendant, as Treasurer of the Navy, was indebted to one Priestman in a sum of 58*l*. Priestman died 2d June, 1784; and on the 13th of August, 1785, one Brown forged a paper, purporting to be the will of Priestman, by which he was made sole executor, and probate was granted of it to Brown accordingly, who under such authority received from the defendant the money due to Priestman. Afterwards the fraud appearing, Brown was cited, and not appearing, the will and probate were declared to be void, Allen v. Dun-  
dale.  
3 Term Rep.  
125.

## ASSUMPSIT.

and administration granted to the plaintiff, who now brought *assumpsit* for money had and received against the defendant; the Court were of opinion, that the defendant having paid the money to a person having authority from a court of competent jurisdiction, that such payment was lawful, and that he should not be compellable to pay it again.

S. C.

But the Court seemed to be clearly of opinion, that *had Priestman been living*, and an instrument as above been forged, and the defendant had paid the money, that it would have been recoverable: for in such case the ecclesiastical court would have had no jurisdiction, the party being living, and so the authority would have been void.

“ Therefore, if a person *pays a forged bill or bond on such like security*, it is no discharge against the real creditor, for *“ the authority is clearly void.*”

Cheap v. Harley,  
& al. 3 Term  
Rep. 127.  
Robson v.  
Eaton, *supra*.

As where the defendants who had a house both in *America* and *London*, drew two bills in *America* of the same tenor and date on their house in *London*, in favour of the plaintiffs; one of them being lost, came to the hands of a third person, *who forged the payees indorsement* and received the amount of it from the defendants: afterwards the real payees sued them on the other bill, when the payment of the forged one was held to be no discharge, and the plaintiffs recovered the amount of it.

Sir R. Newdigate v. Davey.  
1 Lord Raym.  
742.

So where a sum was ordered to be paid by the *High Commission Court* by the plaintiff to the defendant, the plaintiff was afterward allowed to recover it back, because ordered to be paid by a void authority, the action being brought after the Revolution.

2 Burr. 1012.

“ 4. To recover back money obtained from any one by *“ extortion, imposition, oppression, or taking an undue advantage* *“ of the party's situation.”*”

Astley v. Reynolds.  
2 Stra. 915.

As where the plaintiff having pawned plate to the defendant for 20*l.* at the end of three years came to redeem it, and tendered 4*l.* being more than the legal interest for that time; the defendant refused to take less than 10*l.* upon which the plaintiff paid the 10*l.* and had his goods, and now brought his action for the surplus above legal interest so extorted from him; and on a case made, the court held the action maintainable for the money so obtained from him against his consent. *Note*, It was in this case objected, 1<sup>st</sup>, That the plaintiff should not have paid the money, but have brought trover; but this was over-ruled, as the

the plaintiff might want his plate immediately. 2dly, That *volenti non fit injuria*, he having voluntarily paid his money. But, it was answered, That that only holds where the party has a freedom of exercising his will; which here he had not.

So where the plaintiff's brother was a bankrupt, and the Smith v. Bromley. Doug. 671.  
was induced by an agent for the defendant, who was a principal creditor, to give him 40*l.* to sign the bankrupt's certificate, the money so paid for that purpose was allowed to be recovered back in this action, as oppressively and unjustly extorted from the plaintiff.

So in *assumpsit* on a promissory note, the circumstances Cockshott v. Bennet, & al. 2 T. Rep. 763.  
were, that the defendants being considerably indebted to the plaintiff, and other creditors, and being insolvent assigned over all their effects in trust, to pay eleven shillings in the pound to all their creditors, to which they all consented except the plaintiff, who refused to sign the deed or receive any composition, unless the defendants would give him a note for the remaining nine shillings: on which the defendants gave him the note in question, to that amount; and then the plaintiffs signed the deed. On an action being brought on this note, it was resolved, That this note having been obtained under the circumstances of taking advantage of the defendant's situation, and being a fraud on the other creditors, was void; and though the defendants had made a subsequent promise to pay, that this should not set up that security, which was void in its creation.

" 5. This action lies to recover back money *embezzled*,  
" or which any person has been *defrauded of* by cheating,  
" or otherwise."

As where the defendant was nurse to a person on his Whip v. Thomas. Trin. 1 Geo. 3. Bull. N. P. 130.  
death-bed, and when he died went off with the money he had about him, the administrator of the person deceased was allowed to recover back the money so embezzled, by this action, as money had and received to the plaintiff's use; and Lord Chief Justice Parker said, he would presume a subsequent agreement to make a contract of it, and the bringing the action was an admission of such consent.

" And the owner shall recover the property embezzled,  
" though not in the hands of the person embezzling it,  
" but of a third person, if such person has obtained it ille-  
" gally, or *mala fide*."

As

Clarke v. Shee  
& al.  
Cowp. 197.

As was this case, wherein a clerk to the plaintiff had embezzled notes and money of his to a considerable amount, which he had paid away in the insurance of tickets in the lottery to the defendant, which insurance was contrary to stat. 12 Geo. 3. ch. 3, 36, it was held; That as these notes and money were not paid *bona fide*, but for an illegal consideration, and their identity could be traced, that the real owner should recover them.

Burr. 1009.

"6. If money has been recovered in consequence of  
"any judgment or adjudication, if such was erroneous, and is  
"reversed; or if money has been paid in consequence of  
"the judgment of an inferior court, where, from the li-  
"mits of its jurisdiction, the merits could not be tried,  
"it shall in this action be recovered back again."

Feltham v.  
Terry.  
B. R. East.  
13 Geo. 3.  
Buller N. P.  
131.  
Quot. Cowp.  
419.

As where the defendant levied money by seizing and selling the plaintiff's goods, under a justice's warrant, founded on a conviction, which conviction was afterwards quashed, it was holden that an action for money had and received then lay, for the clear money produced by the sale.

Moses v.  
M'Farlane.  
2 Burr. 1005.  
2 Black. R. 219.  
S. C.

So where the plaintiff had been sued in an inferior court, and had matter of defence, of which, if he could have availed himself, it would have discharged him, but which, from the nature of the court, he could not have, and so had judgment there against him and had paid the money; he recovered the amount of such judgment by this action.

"7. Where any species of contract is by law or statute  
"declared to be illegal and void, money paid in con-  
"sequence of such contract may be recovered back by  
"this action, provided the party who paid the money  
"was not himself a *particeps criminis* in the illegal trans-  
"action."

Jaques v.  
Golightly.  
2 Black. Rep.  
1073.  
Jaques v. Withy.  
H. Black. Rep.  
65, 8. P.

For where by act of parliament all insurances on the lottery were prohibited and declared to be illegal in the lottery office-keeper, and void, and the plaintiff had paid to the defendant a sum of money as a premium on the insurance of several numbers in the lottery, contrary to the act, he brought this action for the money so paid, and recovered it.

S. C.

But (*per* Just. *Blackstone*) Where both parties are made criminal, in such case the money cannot be recovered back again, as the stock-jobbing act, 7 Geo. 2, 8. in which both parties are made criminal and liable to penalties; but under the lottery acts, the office-keeper only is made criminal, and therefore the party who has paid the money  
not

## ASSUMPSIT.

7

not being criminal within the statute, he may recover back the money he so paid.

But where the plaintiff was a lottery-office-keeper, and had paid to the defendant several sums of money, being losses on numbers which the plaintiff had insured, and he now brought his action to recover back the money so paid, the action was adjudged not to lie, for the illegal act had been done by himself in making the insurance; and he having paid the money from a motive of honesty, though not compellable by law, should not recover it back. Browning v. Morris. Cowp. 790.

These are cases of implied contracts, in which the defendant, having obtained possession of the plaintiff's property, is compellable by this action to restore it. A similar obligation arises where the law has given a claim against any one. In this action such claim is asserted and recovered.

As in those cases: "1st. If a person becomes a member of any society or company, he thereby agrees to abide by all legal claims arising against him from the bye-laws or local regulations of that society to which he belongs."

Therefore *indebitatus assumpsit* was held to lie against the defendant for 20*l.* being the penalty forfeited by the bye-law of the company for not serving the office of steward, in pursuance of such bye-law. Barber Surgeons Company of London v. Pelson, 2 Lev. 252.

So was the action held to lie for scavage; it being found to be due in London by custom. Mayor of London v. Sory. Carth. 92.

"2. So where a power is given by law to impose any assessment on the subject, the implied consent of every person to abide by any legal decision or adjudication, raises an implied contract to pay such assessment, which is the foundation of an *assumpsit*."

Therefore, where by an act of parliament power was given to commissioners to divide common fields, and to make such regulations and orders as they should think fit, they awarded that all proprietors of land allotted to them, which had been ploughed or manured since any corn had been reaped, should pay to the person who had manured it four shillings per acre, general *indebitatus assumpsit* was held to lie for it. Bell v. Burrows, C. B. East. 5 G. 3. Bull. N. P. 129.

So general *indebitatus assumpsit* was held to lie for tolls.

So for petty customs *indebitatus assumpsit* lies.

"3. Wherever the law has given to any person certain fees or rewards for his employment or trouble, in this action they are recoverable."

Seward v. Baker. 1 T. Rep. 18. Mayor of Exeter v. Trimlett. 2 Will. 95.

Sir William  
Saunderson v.  
Bignall.

2 Sura 747.  
Duppa v. Ger-  
rard.  
Salk. 78.

Stockhold v.  
Collington.  
Salk. 330.

As where the plaintiff in this action recovered the fees due to him as Usher of the Black Rod.

So the fees on being knighted were recovered against the defendant by the ushers and daily waiters to the king.

So where one was named a commissioner to examine witnesses in a cause out of Chancery, and officiated accordingly, he recovered his fees in this action.

In this form of action *Attornies* recover their fees; as to whom it is enacted by stat. 3 *J.* 1, 7. *sect.* 1. that every attorney "shall give to his clients true bills of all the charges of suit under his own hand, before he can charge his client with payment thereof."

And by stat. 2 *Geo.* 2. 23. *f.* 22. "No attorney or solicitor shall commence or maintain any action for fees or disbursements at law or equity, till the expiration of one month after he shall have delivered to the party, or left for him at his dwelling-house, a bill of such fees, &c. written in a common hand, and in *English* (except law terms and names of writs) and in words at length (except times and sums) and subscribed with his proper hand."

On these statutes it has been decided,

Barnes 26.  
Clarke v. God-  
frey.  
1 Sura. 633.

1. If an attorney brings an action on his bill, the court will stay proceedings till he has delivered a bill to the defendant; for before that, under the statutes, he cannot maintain an action.

Martin v. Win-  
der.  
Doug. 189.

But where an action is brought *against an Attorney*, and the plaintiff is indebted to him in a bill for business done, the Attorney may give his bill in evidence *as a set off*, though it has not been a month delivered: but it should be delivered time enough before the trial, for the plaintiff to have it taxed.

"And the bill must be *left with the client* for a month before the Attorney can sue him on it."

Brooks v.  
Mason.  
H. Black. Rep.  
290.

For where the circumstances were, that the Attorney had delivered his bill in due time to the defendant, who acknowledged the debt, and said he would pay it, but that he did not know what to do with the bill: upon which the plaintiff (the Attorney) *took it back again*; and at the end of the month brought his action on it. He was nonsuited: the judge being of opinion, That the bill ought to be *left with the defendant*; it being the intention of the statute, that the client should have time to examine the charges, and take



take advice on them, if necessary: and, on a motion for a new trial, the direction was held to be right.

2. If the business has been done in the *inferior courts*, Brickwood v. it has been held, that the defendant cannot take advantage Fanshaw. of the statute, *that no bill has been delivered*; for the statute Show. 96. is confined to business done in the courts above.

And in an action on an attorney's bill for *business done at the quarter sessions*, and no bill had been delivered, Buller, Jackson. Just. ruled, That it was not necessary, the statute only ex- York Sum. Aff. 1786. tending to cases of business done in a *Court of Record*.

But if *any part* of the business had been done in the *superior courts*, the court would at all times refer the bill, Ex parte. Jackson v. though the rest had been done in an inferior court, as at Williams. the Quarter Sessions, *ex gr.* But now though all the business has been done at the sessions, the court will nevertheless refer the bill to be taxed. 4 Term. R. 124, & 496.

3. Though the statute is a good plea to an *indebitatus assumpsit* generally, yet to a special promise, or *in simul computasset*, it is no plea. Salk. 86.

4. The statute does not extend to business done in *conveyancing*, nor to the executor of an attorney; and it may be given in evidence on the general issue. Bull. N. P. 145. Milner v. Crowdall. Show. 338. Gregg's case. Salk. 89.

5. If an attorney brings an action for his fees, the court will not stay proceedings on it, nor refer it to a Master, unless the business, or at least part of the business, has been done in the court where the action is brought.

6. And where an attorney has furnished his bill, and the client does not refer it to a Master to have it taxed, but he drives the attorney to an action, the defendant shall not be admitted before a jury to question the *reasonableness of the items* contained in the bill. Williams v. Frith. Dougl. 188.

Neither shall he be put to prove the several items having been actually done, for that is a matter proper to be inquired of on a taxation, not before a jury; and the client's acquiescence, and not applying to have the bill taxed, is an admission both of the business done, and the reasonableness of the charges. Philips v. Roach. Hercf. Sum. Aff. 1782. MSS.

However, in a cause before Mr. Baron Smyth, at Stafford, the next year, the foregoing case being cited, he laid it was to be understood with some restriction; and could only mean that every small item need not be proved, but that there must be a foundation laid, by shewing the

the existence of the causes and business for which the charges were made, and proving the main articles.

4. "Wherever the law has imposed *any duty* upon a person, and given him certain *allowances or charges for it*, he shall recover them in this action; but in such case the duty must be performed, and the party's claims be limited accordingly."

As where, by stat. 22 Car. 2. c. 11. s. 21. it is enacted, "That the rates for crannage and wharfage on the river *Thames* shall be assessed and allowed by his Majesty and Privy Council, and no others be taken; and obliges wharfingers, under a penalty, not to refuse to suffer any goods or merchandise to be landed or shipped at or from such wharf."

*Stevens v. Coffey*, 3 Burr. 1408. 1 Black. Rep. 413. S. C.

It was resolved in this case, That where an Order of Council had been made pursuant to that statute, regulating the rates of crannage and wharfage, That where a vessel was fastened to the wharf, that such rates were recoverable by this action as far as the wharf or crane were used; and therefore it was to be paid only for goods *actually landed*, and for which the wharf had been used; not for goods taken from on board the same vessel, and carried off in lighters while she lay at the wharf.

*Pole v. Johnson*, 2 Black. Rep. 764.

So where, under stat. 22 Geo. 2. 40. the trustees of Ramsgate Harbour, being bound to keep it in repair, have a power to impose a duty of 6d. a ton on every ship loading, discharging, or sailing *from, to, or by Ramsgate*, or coming into harbour there; and this action was for 3l. 10s. assessed on the defendant's ship as sailing by Ramsgate. It was found by a special verdict, "That the vessel had sailed four leagues S. E. off the Goodwin Sands, and not within the Downs, or in sight of Ramsgate, and that ships sailing in that course rarely receive assistance from the Ramsgate pilots, Deal being equally near." On this finding, the defendant had judgment; for the act confined the duty to ships only coming into the Downs, which was the situation in which *they were likely to be advantaged by Ramsgate Harbour*, not to ships which could receive no benefit from it.

2. "These are the most material grounds of this action arising from the implication of law: I shall now proceed to such as arise from *express undertakings*."

2dly, OF EXPRESS CONTRACTS.

The principal species of Express Contracts which I shall consider, are,

- 1st. Contracts founded on Sales.
- 2d. On Wagers.
- 3d. For Use and Occupation.
- 4th. On Bills of Exchange and Promissory Notes.
- 5th. On Policies of Insurance.

1st. OF ASSUMPSIT ARISING ON SALES.

This action founded on sales, may be either at the suit of the vendor for the price of the thing sold, or of the vendee to recover back the money he has paid, some defect appearing in the thing sold, or fraud in the vendor; the first on the express; the latter on the implied undertaking.

1. "If a contract is made on a sale, it is always supposed that the vendor has a good title; if therefore there is any concealment of the circumstances affecting the title, and the vendee has paid the purchase-money, he may waive the bargain, and recover back his money."

As where the defendant, who was an auctioneer, had sold to the plaintiff an interest in land, for which the plaintiff had made a deposit of 50*l*. but there appearing an objection to the title, and the want of disclosure of some circumstances, which should have been disclosed at the bidding, the plaintiff declined going on with the contract, for sufficient reason in the opinion of the Court. In consequence of which, he recovered back the deposit so made.

*Borough v. Skinner.*  
5 Burr. 2639.

But in such case where the title is not good, the person who had become the purchaser can only recover back his deposit, with interest; not any farther damages for the supposed loss of a good bargain.

*Flureau v. Thornhill.*  
2 Blackst. Rep. 1078.

"And where things are sold by auction, and in the printed conditions of sale there is a statement and warranty of the title, the things shall be deemed to be sold under such title, and the declarations of the  
"auctioneer

“ auctioneer at the time shall not be admitted to vary or  
“ qualify it.”

Gunnis v.  
Erhart.  
H. Blackst. Rep.  
289.

For where the plaintiffs sold certain estates by auction, and in the printed articles they were stated to be *free from incumbrances*, the defendant bid for them, and they were knocked down to him; but afterwards discovering that there was a charge affecting them of 17l. per ann. he refused to complete the purchase, for which cause this action was brought. The plaintiff offered evidence to prove, that the auctioneer had at the time of sale informed the bidders of this charge, but Lord Loughborough refused to admit it, and nonsuited the plaintiff. On a motion for a new trial, the Court concurred in his opinion, as it would open a door to fraud, to admit verbal declarations of the auctioneer contrary to the printed conditions of sale.

Borough v.  
Skinner, ante.

*Note.* It seems not to be material whether the auctioneer has paid over the money to his principal or not; for the Court seemed in this case to be of opinion, that the auctioneer was as a stakeholder, and should not part with any deposit so made, till such time as the sale should be finished and completed, and it should appear in the event to whom it belonged.

2. “ This is the case where there is no possession delivered to the vendee of the thing purchased. If possession has been given, this action for money had and received will not lie, *unless the goods so purchased have been returned*; for then the contract is at an end, and the plaintiff may sue for the money.”

Towers v.  
Barret.  
1 Term Rep.  
133-

As where the plaintiff purchased from the defendant a one horse-chaise, for which he paid ten guineas, and it was agreed at the time of the sale, that if it did not please the wife of the plaintiff, he should be at liberty within three days to return it, paying 3s. 6d. per day for the hire of it. Within the three days he did return it, and then brought his action for the ten guineas he had paid, when it was resolved, That the sale being conditional, that he had rescinded the contract by returning the chaise, and that he might recover the sum he had at first advanced; and the plaintiff had judgment.

“ And as the contract must be at an end before this action can be maintained, so it must be rescinded by the party who means to sue for his money *in a reasonable time*, as otherwise he must sue on the special contract itself, and recover damages for the breach of it.”

As where the plaintiff declared that the defendant had sold him a pair of horses, warranted five years old, but which in fact were proved to be but four. The plaintiff had neglected to return them in a reasonable time, and brought his action for the money. It was ruled by Justice Buller, that the plaintiff not having returned the horses in a reasonable time, that he could not now rescind the contract, so that it still continued, and he could not therefore recover back his money, but that he might recover damages on the warranty; that is, the difference of value between horses of four and five years old.

Compton v. Burn.  
Sit. West. Mich.  
26. G. 3. MSS.

"And in such case the plaintiff must declare on the warranty or special agreement itself, as *assumpsit* for money had and received will not lie."

For where the plaintiff purchased a pair of horses for seventy guineas from the defendant, but which he undertook to take back, if returned within a month. The plaintiff did return the first pair within the month, but took a second pair; these he also returned, and took a third, which he also offered to return; but the defendant refusing to take them, he brought his action for money had and received, and held not to lie, the contract being still open.

Weston v. Downes.  
Dougl. 23.

"But to enable the party to maintain his action on the warranty, it is not necessary that the thing purchased should be returned, or notice given of the defect to the seller."

For where the defendant had, in the month of March, sold to the plaintiff a mare, which he warranted sound and free from blemish; soon after the sale the plaintiff discovered that she was unsound and vicious; he kept her for three months after the discovery, during which time he endeavoured to cure her; he then sold her, but she was returned as unsound, and he kept her till the October following, when he sent her home to the defendant, who refused to take her, and she died on the way. It was proved in evidence, that she had been unsound when sold. It was resolved that this defect subsisting when the warranty was made, that the action lay, though she was not returned, nor notice given.

Filder v. Parkin.  
H. Black. Rep.  
17.

3. "When a purchase is made, if the money is paid, and the thing contracted for is not delivered, vendee may by this action recover back the money so advanced, this disaffirming the bargain; otherwise, when the bargain is made, the property of the goods is transferred to the vendee, and that of the price to the vendor;

Anon.  
1 Stra. 407.  
2 Black. Com.  
448.

## ASSUMPSIT.

“ vendor; and he may maintain *assumpsit* for the price, even before delivery of the things sold, provided the sale has been a good one. As to which, those points have been settled.”

Per Ld. Mansfield.  
Cowp. 296.

1. “ If the vendor takes upon himself the delivery of the goods purchased to the vendee, he stands all risques; but if the vendee points out the particular mode of conveyance by which the goods are to be sent, and vendor sends them according to such direction and they miscarry, vendee must stand at the loss.”

Vale v. Bayle.  
Cowp. 294.

For where in an action for goods sold and delivered, it appeared that the defendant had ordered the goods to be sent to him, and by letter desired, “ that instead of sending them by Bristol, that they should be sent *by land-carriage* ;” it was proved in pursuance of this, that the goods were delivered to the book-keeper of the Birmingham carrier, to be sent by way of Coventry to the defendant, who lived in Carmarthen, and *that there was no other mode of conveyance by land-carriage*, and the goods were lost. It was resolved, that a delivery according to the defendant’s order, was a delivery to himself, and that he was liable for the price though they were lost.

2. By the statute of frauds, 29 Car. 2. c. 5. §. 6. it is enacted, “ That no contract for the sale of any goods for the price of 10*l.* or upwards shall be good, except the buyer accept part of the goods sold, or gives something in earnest to bind the bargain: or there be some note in writing of the bargain made, and signed by the parties to be charged with such contract, or their agents lawfully authorized.”

Under this statute it has been adjudged,

1. “ That since the statute, *no parol agreement* for the sale of goods above 10*l.* value is good or binding on the parties, unless there is earnest or delivery given.”

Alexander v.  
Comber.  
H. Black. Rep.  
20.

For where the case was, that at Lewes Fair the plaintiff had agreed to buy some sheep from the defendant, and to take them away by a certain hour, but there was no earnest given, nor were the sheep delivered. The plaintiff not coming at the time appointed, nor sending for the sheep, the defendant sold them to another person; the plaintiff brought *trover* for them, when it was resolved that the action could not be maintained; for there was *no property in the plaintiff*, the sale being void under the statute of frauds, as there was no note in writing, the agreement being merely verbal, nor earnest or delivery.

2. “ That

2. "That it extends only to cases wherein the seller is to deliver the goods immediately, and the buyer immediately to pay for them; that is, to contracts executed, *not to cases* wherein the contract is executory; and *the buyer is to be furnished with the goods in future and then to pay.*"

Clayton v. Andrews.  
4 Burr. 2101.

As where the defendant bespoke a chariot, and when it was made, refused to take it, and on an action being brought for the price, pleaded, That there was no earnest or note in writing, and so that the contract was void, under the statute of frauds. But it was ruled that the statute did not extend to executory contracts of this nature.

Towers v. Sir J. Robinson,  
1 Stra. 506.

3. "Goods sold at public auctions are not within this statute; that is, no earnest or note in writing *between the parties* is required."

For where goods at an auction were knocked down to the defendant, and his name entered in the auctioneer's book as the highest bidder; he came the next day, and saw them weighed, but failing to take them away, the auctioneer resold them for less than he had done to the defendant, and then brought this action for the difference of the price. Defendant pleaded the statute of frauds; that he had entered into no memorandum in writing, nor given earnest: but it was decided, that the auctioneer was to be considered as *agent* for the buyer as well as the seller, and that *as such*, setting down the name of the buyer, the price, &c. was a sufficient memorandum in writing within the statute to bind the sale, and that the defendant therefore was liable.

Simon v. Motivos.  
3 Burr. 1921.

4. It was decided in this case, 1st. That earnest only binds the bargain, and gives the party a right to demand; but a demand without payment of the money is void, for the money must be paid at the taking away of the goods, as no other time for payment is appointed. 2dly. That after earnest given, the vendor cannot sell the goods without a default in the vendee; and therefore if the vendee does not come and pay for and take away the goods, the vendor ought to request him to do so; and if he neglects, the vendor may sell them again in convenient time after.

Langford v. Admin. of Tyler.  
1 Salk. 113.

Where at a sale by auction one of the conditions of the sale was, that the purchaser was to make a deposit of 25 per cent. on the whole purchase money; it was ruled by Lord Kenyon, that it need not be an exact 25 per cent. on the whole amount, but that if any money was paid as a deposit,

Hanson v. Roberdeau.  
Sitt. G. Hall East. 1792.  
MSS.

deposit, and *accepted as such* by the auctioneer, that it was sufficient to bind the bargain.

*Forde v. Cole.*  
1 Saund. 319. And whatever sum is paid for earnest, or as a deposit, is to be deemed part of the price when the goods come to be paid for.

5. "Where goods are sold by auction, the sale is not complete to bind the buyer to the purchase, till *the lot is actually knocked down to him.*"

*Payne v. Cave.*  
3 T. Rep. 148. For where the defendant had bid for a lot at an auction, but before the hammer was knocked, recanted his bidding, and said he would not have the lot; notwithstanding which it was knocked down to him, and on his refusing to take it away, it was resold for a lesser sum than the defendant had bid, and this action was brought against him for the difference of the price. At the trial before Lord Kenyon, the plaintiff was nonsuited; and on a motion for a new trial, the judge's direction was held clearly to be right. For that the assent of both parties was necessary to make the contract binding; and though the bidding was an offer, and the knocking down of the hammer a signification of the seller's assent, yet that that was not done here till the defendant had retracted. To deny the bidder a power to retract, would be to bind one party and not the other.

6. "Where a deposit has been made, it should seem that if vendee does not perform the bargain, he shall forfeit such deposit; which is the rule in equity."

*Saville v. Saville.*  
1 P. Wms. 745. For where on a sale under a decree, a part of the purchase-money was deposited, and the vendee afterwards refusing to complete the purchase, the vendor filed his bill to compel the payment of the money and perfect the sale; the Court allowed the defendant (the vendee) to forfeit his deposit, and give up all claim to the thing intended to be purchased.

*Bexwell v. Christie.*  
Cowp. 395. 7. It was resolved in this case, that when a person sends an article to an auction which advertises to sell to the best bidder, with orders *not to have it sold* under such a price, an action will not lie against the auctioneer if he sells it at a price less than that so mentioned, as such dealings are a fraud on buyers, who suppose the lot is to be knocked down to the best *real bidder*; but it is otherwise, had he ordered it *not to be set up* under such a price.

*Williams v. Wellington.*  
H. Black. Rep. 81. And note, That an auctioneer who sells goods may maintain an action for them against the buyer *in his own name*, even where the goods were sold at the proprietor's own



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own house; for he has a possession coupled with a special property or interest, a lien for the charges of the sale the commission and auction duty which he is bound to pay.

And so if an auctioneer will not give up the name of his principal, he is *personally* liable to an action, on a warranty or representation respecting the thing sold, or for not completing the purchase after it had been knocked down; but if the principal is known, the action should be against *him*.

Per Lord Kenyon. *Hanson v. Roberdeau*.  
S. Guild.  
East. 1792.

2d. The next ground of *assumpsit* on express contracts I shall consider, is that arising from

## WAGERS.

“Wagers upon indifferent matters, without any interest in the parties farther than the wager itself, are not allowed by the laws of this country, unless where they are restrained by particular acts of parliament.”

Per Lord Mansfield.  
Cowp. 729.

As in this case, where the wager was, Whether one Susannah Tye had not bought a certain waggon of one David Coleman? After a verdict for the plaintiff, it was moved in arrest of judgment, 1st, That all wagers were void at common law, where the party has no interest in the subject, except that created by the wager. 2dly, That wagers came within stat. 14 Geo. 3, 48, as wagering policies; but it was resolved by the court (*dissentiente Justice Buller*) 1st. That an interest in the subject matter was not necessary to enable the party to maintain this action, which might be on indifferent matters. 2dly, That wagers were not within the stat. 14 Geo. 3, which was confined to policies of insurance and written instruments only.

Good v. Elliott.  
3 T. Rep. 693.

“And *assumpsit* will lie to recover a wager fairly won; but it must arise on a contingency, the event of which is then unknown to both parties: it must not be for a blind to an illegal or an immoral transaction, or to conceal simony, usury, or bribery; nor must it be inconsistent with the sound policy of the state to support it.”

Per Lord Mansfield.  
Cowp. 38.

1. “It is essential to a fair wager that it is contingent, and the event unknown to the parties at the time of laying the wager; for if either side have a certainty of winning, the wager is void.”

C

As

Lord March  
v. Pigot.  
5 Burr. 2803.

As where the wager in question was between two young men on the longest life of their respective fathers. In fact, at the time when the wager was laid, the defendant's father was dead, he having died the same day on which the wager was made; but at such a distance, *that the event could not be known for some days after*. The defendant refused to pay, on the ground that it was impossible he could win, his father being *dead when the wager was made*, and so that as he could not win, he was not bound to pay. But it was held that the event being unknown at the time when the wager was laid, that it was a fair wager; and the plaintiff had judgment for the amount of it.

Jones v. Randall.  
Cowp. 37.

So where the wager was, that a decree of the Court of Chancery would be reversed in the Lords on appeal, and the plaintiff had a verdict; it was moved to arrest the judgment on two grounds. 1st. By asserting that the wager was not fair, from the circumstance that the laws are positive and certain, and so the event not contingent. 2dly. As being illegal, as *contra bonos mores*, it being improper and disgraceful, and so against principle, to suppose that a decision would take place contrary to right; and therefore that the court would not support it. But it was held to be contingent, the question being clearly doubtful. 3dly. That it was neither improper nor prohibited by any positive law, nor contrary to any principle of policy or morality; and the plaintiff recovered.

Cowp. 38.

2. "The ground of the wager must not be an *immoral* or *indecent transaction*, for such cannot be recovered; nor involve any question by which the peace or character of others may be affected."

Da Costa v.  
Jones.  
Cowp. 729.

As where the wager was upon the sex of Mademoiselle D'Eon, the action was held not to lie. 1st. Because it afforded an opening to indecent and improper evidence. 2dly. Because the peace and character of a third person might be materially injured by an inquiry in which such person was not concerned; but by the voluntary acts of two uninterested persons was brought into question.

Cowp. 38.

3. "Neither must it be a cover to an *illegal transaction*, as to conceal bribery, simony, or usury."

Allen v. Hearn.  
Mich. 26.  
G. 3. B. R.  
1 Term. Rep. 56.

As where the wager was between two voters on the event of an election then depending, it was adjudged that the action would not lie; for so it might be made a means of bribery at the election. But had the persons not been voters, it might have been otherwise.

" And

" And a *fortiori* wherever the wager is itself illegal, or arises from an illegal transaction, it is not recoverable. Such are the cases of wagering policies."

So where the wager was on a race, but the sum run for was under 50*l.* and so was illegal under stat. 13 G. 2, c. 19. it was resolved, that the plaintiff could not recover; for the race, which was the subject of the wager, being illegal, so also was the wager. *Johnson v. Bass.* 4 Term. Rep. 1.

Such also are wagers founded on gaming, which are avoided by stat. 9 Ann. c. 14.

But 1st. " Under the statute the wager must arise from play, or be laid on a person playing at some game prohibited by the statute."

For where the wager was that one Clarke would not run four miles in twenty-one minutes; this was adjudged not to be within the statute; for the person by whose means the wager was won was not playing, though it was admitted that a foot-race was a game prohibited under stat. 9 Ann. and that, if it had been laid and proved that Clarke was playing at a game, called a foot-race, that the wager would not be recoverable: but that did not appear, as Clarke might be running for exercise or amusement, and know nothing of the wager; and so could not be said to be playing. *Lynal v. Longbotham.* 2 Will. 36.

2dly. " So where the wager was not on the event of the game played at, but on a collateral matter."

As where it was, Whether one of the players was bound to move a man at backgammon, not on the play. It was adjudged to be recoverable in this action. *Pope v. St. Le.* 10 Mod. 344.

4. " So the wager must not be on a question which it is inconsistent with the sound policy of the state to enter into the discussion of."

As where the wager was respecting the amount of the hop-dues of Canterbury, it was adjudged that the action was not maintainable; for it made it the interest of one of the parties to diminish the public revenue, and was laying open to foreigners the internal resources of the kingdom, and drawing that into discussion which should only be canvassed in parliament. It was therefore a matter which in sound policy ought not to be brought into question. *Atherford v. Beard.* 2 Term. R. 610.

And Note, That to recover a wager, *indebitatus assumpsit* will not lie, but a special *assumpsit*; for *indeb. assumpsit* lies only where debt will. *Bovey v. Castlemain.* 1 Raym. 69. *Hard's Case.* 3d. Salk. 23. S. P.

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3d. " A third ground of this action is that for

## USE AND OCCUPATION.

1. " This was given by stat. 11 G. 2. c. 19, which enacts (ff. 14.) that where the agreement is not by deed, the landlord may recover a reasonable satisfaction for the tenements occupied by the defendant, in an action on the case for use and occupation; and if in evidence on the trial any parol demise, or any agreement not by deed appears, wherein a certain rent has been reserved, the plaintiff may make use thereof as an evidence of the *quantum* of the damages."

" 1. Where there is a note in writing expressing the *quantum* of the rent, no evidence of a parol agreement for the payment of any greater rent than is therein expressed shall be admitted: for this would elude the statute of frauds, if the courts would admit parol evidence to supply or alter written evidence."

**Preston v. Merceau.**  
2 Black. Rep.  
3249.

As in this case where there was a written agreement to let a lease of an house for 26*l.* per ann. on this an action was brought for the use and occupation. The defendant paid 26*l.* into court. At the trial the plaintiff offered to give parol evidence, that beside the 26*l.* per ann. the defendant was to pay the ground landlord, 2*l.* 12*s.* 6*d.* This evidence was held to be inadmissible, particularly as no evidence was offered that such payment had ever been made.

**Green v. Harrington.**  
Hutt. 24.

Before this statute, rent was recoverable only by action of debt; for at common law *assumpsit* would not lie for it.

2. " *Assumpsit* for use and occupation will only lie where the defendant holds by permission, or by demise from the plaintiff; not where his possession is adverse and tortious; for such excludes the idea of a contract, which in all cases of this action must be express or implied."

**Birch v. Wright.**  
3 T. Rep. 378.

For where the defendant was tenant from year to year to Mr. Bowes, and he and his wife granted an annuity to the plaintiff, charged on the estate of which the defendant was tenant, in the year 1777, Bowes received the rents till November 1784, when 8*l.* rent was in the defendant's hands; in 1785 the plaintiff brought an *ejectment* and recovered possession, and then gave notice to the tenant (the defendant) to attorn to him, and pay over to him the rent then in his hand. Defendant refused to attorn or pay him the rent; upon which a writ of possession

son was executed, and this action brought for use and occupation, for the rent accruing from the time when the last payment was made to Bowes, to the execution of the writ of possession. When it was resolved, That the plaintiff might recover for the time *before the ejectment brought*, but *not for the rent accrued after*; for by bringing the ejectment, the plaintiff had from that time considered the defendant as a trespasser, his title tortious, and so there could be no contract implied.

3. Tenant at will demised over to another. It was *Atkinson v. Denuison, Justice*, That he might maintain an action for use and occupation; that however the law might be as between the original landlord and the first tenant, yet that there was a contract between the tenant at will and the defendant; and as the defendant had enjoyed the benefit of the contract, he thought the action was clearly maintainable. *Pierpont Lincoln Ass. 1775. MSS.*

“ So that it seems to be a general rule, that, as this action is founded on a contract, wherever the defendant enjoys by permission of or demise from the plaintiff, that he shall be liable in this action, and shall not be allowed to question the plaintiff’s title.”

For where in an action for use and occupation, the plaintiff gave evidence of payment of rent by the defendant, for 19 years, the defendant would have gone into evidence to prove a title in another. Per *Wilmot Justice*. *Morgan v. Ambrose. Monmouth Lent Ass. 1756. MSS.* Payment of rent, and holding under a person, for so long a time, is conclusive evidence against the defendant; and he cannot set up a title in another. And as to the objection that has been made, that the defendant may be liable to two actions for the rent, by the persons having different titles, that cannot be the case; for though another has title, yet he cannot bring an action for the rent till he has made an entry, and recovered in ejectment; and then it must be trespass for the mesne profits.

But he agreed, that though the defendant could not *s. C.* controvert the title, yet that he might give evidence to explain the holding under him, as that he was executor during the minority of A. B. and that his interest was then determined. For that admits the plaintiff’s title, during the time the defendant held under him.

4. By *s. 15.* same statute, “ It is enacted, That if any tenant for life dies before or on the day on which any rent was made payable, upon any lease which determined with the life of such tenant for life, his executors or administrators may in this action recover against the un-  
“ der-

“der-tenant such a rateable part of such rent as would be due to the tenant for life for the time he lived.”

Page v. Gee.  
1 Burn's J. 477.  
Ambler 198.

In Chancery, *Id.* *Hardwicke* decided, that when *tenant in tail* made a lease for years, and died a week before the rent became due, *without issue*, that his executor was intitled to an apportionment of the rent; for though tenant for life only is mentioned, yet he as to this is a tenant for life. In the same case Lord *Hardwicke* was of opinion, that tenant for years determinable on lives, was within the mischief of the statute. So where a wife had an annuity as a separate maintenance, payable quarterly, and died in the middle of the quarter, the annuity it was held should be apportioned, though annuities are not within the statute.

Howell v.  
Hanforth.  
2 Black. Rep.  
1016.

4th. The next class of Express Contracts, which are the foundation of this action, arise on

#### BILLS OF EXCHANGE AND PROMISSORY NOTES.

Under this head, I shall consider, 1st. Those points in which Bills of Exchange and Promissory Notes agree: 2dly, In what they differ.

1st, Bills of Exchange and Promissory Notes agree, first, in their being negotiable when drawn in a particular form, 2dly, In the *mode* in which they are negotiable. 2dly, They differ in this, that in the case of Bills of Exchange, the forms of acceptance and protest are necessary; which in cases of notes are not required.

These form the following heads:

1. What Bills or Notes are of a negotiable nature.
2. In what manner negotiated. 3. The acceptance of Bills of Exchange. 4. The Protest. 5. The nature of payments by Bills or Notes.

#### 1. Of what Bills or Notes are of a negotiable Nature.

##### 1. What Notes are of a negotiable Nature.

Pottet v. Pearson.  
Salk. 129.

Bills of exchange drawn in the usual form, of being *payable to A. B. or order*, were at all times negotiable by the custom of merchants; but promissory notes were first made so by stat. 3 & 4 Ann. c. 9. s. 1, which enacts, “That all notes signed by any person, or by any body, politic or corporate, or by any person intrusted by them to sign such notes, promising to pay to any other person, or order or bearer, the money mentioned in such note shall be assignable over by indorsement as inland bills of exchange.”

"change are; and the indorsee may maintain his action on such indorsement."

1. It is sufficient, if the note is drawn in the maker's hand-writing, thus: "I *A. B. promise to pay,*" (or his name be written by him, in any part of it) &c. without being *subscribed A. B.* though the words of the statute are *signed* by such person; for the statute does not direct the name to be in any particular part, or subscribed in any particular manner. Taylor v. Dobbins, 1 Stra. 399.  
Vid. 2 L. Raym. 1376.

2. "No promissory notes are negotiable, but such as are for the payment of money *absolutely*. For if they depend on a contingency, they are not negotiable."

As where the note was, "I promise to pay *l.*—— on the death of George Henshaw, if he leaves me so much, or I am otherwise able." It was adjudged, that this note was not a negotiable one within the statute; for it was; for the payment of money on the contingency of George Henshaw leaving the person so much money, or that he would otherwise be able, neither of which might happen. Roberts v. Peak, 1 Burr. 323.

So where the note was a promise to pay *l.*—— *after the defendant's marriage*, it was held not to be a negotiable note; for the defendant might never marry, and so the note was contingent. Beardley v. Baldwin, 2 Stra. 1151.

Therefore notes *in the alternative* are not negotiable, as a note promising to pay or deliver an horse, or to pay if *J. S.* does not, are not negotiable notes; for the note becomes a nullity by performance of the other part of the alternative. Smith v. Bome, 2 L. Ray. 1596.

"But where notes are to become payable on an *event* which will certainly happen, and take effect in future, they are then negotiable."

As where the note was for the payment of money *six weeks after the death of the defendant's father*, it was held to be a good negotiable note, for the event was certain, and the uncertainty only went to the time of payment, which did not destroy its negotiable nature; for such is the nature of all notes payable after sight. Cooke v. Coleham, 2 Stra. 1212.

"As in the cases already cited, of notes payable on the death of any person, which are uncertain as to the time when they would become payable, that depending on the time of the person's death." So where the promissory note was to pay, upon the receipt of the maker's wages and prize-money from his Majesty's ship *Suffolk*; this was adjudged to be a good and negotiable note, as the paying of a ship was a thing certain, Evans v. Underwood, 1 Wil. 262.

Andrews v. Franklin. certain, though the time when it would take place was uncertain.  
1 Stra. 24. S. P.

Goss v. Nelson. "And so a note at first contingent may, by subsequent words, become positive and negotiable;" as, if a note was drawn by an infant, promising to pay "*when he comes of age*," that would not be negotiable, on account of the uncertainty of the event; but when it is added, "on his coming of age," viz. "12th June, 1750," there the time is specified, and it becomes a certain debt, *solvendum in futuro*.  
1 Burr. 226.

3. "Notes, in order to be negotiable, must be for the payment of money only."

Martyn v. Chauntry. For where the note was "to deliver up horses and a wharf, and to pay money at a particular day." It was adjudged to be not a note negotiable within the statute, not being for the payment of money only.  
2 Stra. 1271.

Moor v. Vanlute. So a promise to pay 300*l.* to B. or order, in three good E. I. Geo. I. C. B. *East India Bonds*, was held to be not a negotiable note within the statute.  
Bull. N. P. 273.

4. "No express form of words is necessary to constitute a good and negotiable note, provided it amounts to an absolute promise to pay."

Morris v. Lee. As a note promising to be accountable to J. S. or order, value received, or for the debt of another (1 Stra. 264.) is negotiable.  
1 Stra. 629.

Chadwicke v. Allen. So acknowledging to have received certain notes, and to be indebted in the balance, which the maker of the note promises to pay, is a good and negotiable note.  
1 Stra. 706.

"And where a note contains a promise to pay absolutely, it is not necessary to add for value received."

Popplewell v. Willon. For where in error from C. B. in case on a promissory note, whereby the defendant promised to pay to the plaintiff — *l.* for a debt due by A. B. to the plaintiff, it was objected, That this not being for value received, was not within the statute, and, *prima facie*, the debt of another is no consideration to raise a promise; but the Court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received.  
1 Stra. 264.

## 2. What Bills of Exchange are of a negotiable Nature.

1. "Bills of exchange must be drawn for the payment of money absolutely, in order to be negotiable; that is, they must not



"not to be confined to credit on any particular thing or fund, or depend for payment on any particular event or contingency."

For where the bill of exchange was drawn "on the monies in the drawee's hands belonging to the proprietors of the Devonshire mines, being part of the consideration money, for the purchase of the manor of *West Buckland*;" this was held to be not a negotiable bill of exchange; for it was charged on a particular fund which might not answer, and so the bill was not payable at all events. Jenny v. Harle.  
1 Stra. 591.

So where the bill was drawn thus: "*Pay to M. R. 32l. out of William Stewart's money, as soon as received*;" this was adjudged not to be a negotiable bill of exchange, on account of the uncertainty of the fund on which it was drawn. Dawkes v. Ld.  
Deloraine.  
3 Will. 208.

So where the bill was drawn by an officer on his agent, on his growing subsistence, it was adjudged not negotiable for the same reason. Jocelyn v.  
Laferre.  
1 Stra. 591.

"For it is essential to a bill of exchange, that it shall depend on the *personal credit* of the parties, whose names are on the bill, independent of any fund, event, or contingency; for in order to charge them, they must be *personally liable*; but when the bill is drawn on any fund, the fund is the debtor, not the person; so when drawn on any contingency, the person is not liable till the contingency happens. So that it becomes necessary to ascertain what are properly bills of exchange, and what not; as if the bill is not a negotiable one, the party is not liable to an action on it." Therefore, in the case of *Dawkes v. Ld. Deloraine, supra*, which was against the defendant, as drawer of the bill therein mentioned, he was adjudged not to be liable; for having charged the bill on the money of William Stewart when it was received, he did not mean to make himself liable, and he had judgment accordingly.

"But where a particular fund is mentioned, *if that is one that is certain*, and the party is still liable personally beside in that case, the bill is negotiable which is drawn on its credit."

As where it was drawn by an officer in these words: "*Pay to A. B. or order, —, as my quarterly half-pay, to be due from the 24th of June to the 24th of September, by advance.*" This was held to be a good bill of exchange: for the half-pay was a certain fund, and it was only a direction to McLeod v. Snow.  
2 Stra. 762.

to the drawee out of what fund he was to be reimbursed; but the money was to be advanced on the credit of the person.

"But where a bill is so drawn on a particular fund, though not regularly a bill of exchange to charge the parties personally, it shall operate as an assignment of so much, and bind."

**Clark v. Adair.** For where Debiray, an officer, drew a bill of exchange **Sir. East. 4 G. 3.** on the agent of the regiment, "Please to pay to *A. B.* the sum of ——. out of the first money that becomes due to me on account of arrears, or non-effective money;" the defendant did not accept the bill, but marked it in his book, and promised to pay it when effects came to his hands. Debiray died before the bill became due. It was allowed on all hands, that this was not a bill of exchange according to the custom of merchants, being to be paid out of a particular fund; but Lord Mansfield said, it was an assignment for a valuable consideration, with notice to the agent, and he was bound to pay it. He said, the agent is the known public officer for the regiment, and that the administrator could not prevent the money from coming to his hands; and that he remembered a case in Chancery, where the agent (under the like circumstances) had paid the money to an administrator, and he was decreed to pay it over again to the person in whose favour it was drawn; and so this being an action by the administratrix of Debiray, to recover the money to the amount of which the bill had been drawn, it was ruled, That the holder of the bill had a title to the money; and the defendant had a verdict.

**3 Will. 211.**

2. "In order to make bills of exchange negotiable, they must be *payable to order or bearer*. For if a bill is payable to a person only by name, it is not negotiable, as by the terms of it, it is confined to such person only."

"So if a bill of exchange is drawn for a particular purpose, or is directed to be applied to a particular use, such bill of exchange is not negotiable, and that whether the direction is in the body of the bill or by indorsement."

**Ancher v. Bank of England.**  
**Doug. 615.**

For where one Dahl, a Dane, resident in Denmark, being indebted to the house of Heide & Co. of London, applied to one Mestue to get him a bill on London, in order to discharge the debt, Mestue procured him a bill to the amount of the debt from the plaintiffs, on Heide and Co. This bill was a regular bill of exchange, and payable to Mestue or order; Mestue remitted the bill to London, with this indorsement: "*The within bill to be credited*"

"credited to Dahl, value in account;" and the letter in which it was inclosed informed the house of Heide, that it was to be applied to the discharge of the debt due to them by Dahl. The bill was received, and notice given by Heide and Co. that it should be so applied. Afterwards a clerk in the house of Heide forged an indorsement on this bill, and got it discounted at the Bank of England. When the day of payment came, the acceptors having become insolvent, and the clerk absconded, one Fulgbergh paid it for the honour of the plaintiffs (the drawers): and this action was brought to recover back its amount: when it was resolved, that by the special indorsement, the bill, though originally negotiable, ceased to be so; so that not being negotiable farther than to Heide and Co. the Bank of England had paid the money in their own wrong, and the plaintiffs had judgment.

3. "It seems to have been formerly thought necessary that bills of exchange, in order to be negotiable, should express to be *for value received*."

For where the bill was in these words, "Pay to Mr. Richard Banbury, two hundred pounds, on account of the freight of the Vale Galley, and this shall be your sufficient discharge;" the defendants accepted the bill specially. On being sued on this acceptance, it was adjudged not to be a bill of exchange, as wanting the words *value received*. Banbury v. Liffet.  
1 Stra. 1212.

But however, it has been since settled on demurrer, that it is not necessary that the bill of exchange should import to be *for value received*. White v. Ludwich.  
Bailey on Bills of Exch. 72.

These cases apply to the particular nature of promissory notes and bills of exchange. In the following, neither are negotiable, as being void at law in their creation; neither can they by any future negotiability be made valid.

1st. If made by a *feme covert*.

For where a woman during coverture gave a note of hand for a sum of money, it was adjudged to be void; and though in this case *after her husband's death she promised to pay it*, it was held not to establish the note, which was void in its creation. Lloyd v. Lee.  
1 Stra. 94.

2. If given for an *usurious consideration*.

For where the defendant having occasion to borrow two hundred pounds; two persons, of the names of Harris and Stretton, agreed to lend it; but pretending not to have the money, prevailed on him to take goods, which they valued at two hundred pounds, and for which he accepted the bill Low v. Walker.  
Doug. 708.  
Maffa v. Dauling.  
2 Stra. 244.  
S. P.  
of

of exchange in question in their favour. These goods, when they were sold, produced but 117*l*. The bill of exchange was indorsed over to the plaintiff fairly, and for a valuable consideration; and he having sued the defendant on it, it was resolved, That the pretended sale of goods was to give a colour to the parties to take more than legal interest, and so was usurious. 2dly, That the bill, being given in consideration of this usurious contract, was absolutely void (under stat. 12 *Ann.* 16.) even in the hands of a fair indorsee; and the defendant had judgment.

3. If given for money *won at gaming, or lent to game with.*

*Bowyer v.*  
*Brampton.*  
2 *Stra.* 1155.

As where in an action by the indorsee of a promissory note, it appeared that it was given by the defendant for money lent to him *knowingly to game with*, by one *Church*, who had indorsed it over to the plaintiff for a valuable consideration, it was held that stat. 9 *Ann.* 14. having declared all notes, whereof the whole, or any part of the consideration, was money knowingly lent to game with, to be void to all intents and purposes whatever; and this note being of that description, it could never be recovered in any hands whatever.

4. By stat. 15 *Geo.* 3. 51. "All negotiable promissory notes, or inland bills of exchange, for a less sum than twenty shillings, are declared to be null and void, and the person issuing them liable to a penalty of 20*l*."

And by stat. 17 *Geo.* 3. c. 30. it is further enacted, "That all promissory notes, bills of exchange, or draughts, being negotiable, to the amount of twenty shillings or upwards, and less than 5*l*. or for 5*l*. shall specify the names and places of abode of the person to whom or to whose order they shall be payable, bear date at or before the time when they are issued, and be made payable within twenty-one days after date, shall not be transferable after the time limited for payment, and if indorsed, the time must be mentioned, and the name and place of abode, and signing, attested by witnesses."

"5. Any alteration in a bill of exchange in a material part, shall make it void in the hands even of a fair holder for a valuable consideration."

*Maister v.*  
*Miller.*  
4 *Term. Rep.*  
320.

As where a bill was drawn on the defendant dated the 26th of *March*, three months after date, and accepted by him; but while in the hands of the payee the upper part of the figure of 6 was erased, and it stood as dated the 20th. In this form it was indorsed to the plaintiff, who sued the acceptors; when it was resolved, That he could not recover; for

for by this alteration the time of payment was accelerated and materially changed, and by such means the instrument avoided.

*Note.* It is necessary to attend to what notes are negotiable, and what not; for if the plaintiff declares on a note of hand under stat. 3. 4. Ann. 9. and has judgment, and it afterward appears that the note was not negotiable, judgment will be arrested.

Smith v. Boehm.  
Gilb. Rep. 93.

# 1. In what Manner Bills of Exchange or Promissory Notes are negotiated.

This is either by indorsement or without it, that is, merely by delivery.

1st. When a promissory note, or bill of exchange, is of a negotiable nature, it then only can be indorsed over to a third person; I shall therefore consider the decided cases as to indorsements, under the following heads, 1. Who may indorse a bill of exchange, or promissory note: 2. In what manner an indorsement should be made: 3. The effect of the indorsement. 4. The manner and order in which the several parties are chargeable.

## 1. Who may indorse Bills of Exchange, or Promissory Notes.

1. The payee of a bill of exchange, or the person to whom the note is payable, must, from the nature of the transaction, be the first indorser.

2. If a note is made to a *feme covert*, she cannot indorse it; for the right is vested in the husband, and *he alone can indorse it*. So if it was made to her when sole, it is the same, for if she afterwards marries, the *husband must indorse the note*; for being personal property, it belongs exclusively to the husband.

Conner v. Martyn.  
1 Stra. 516.  
3 Will. 5.

3. So by the custom of merchants, an executor or administrator may indorse over a note or bill of exchange, for the whole property is in them; and the note or bill is in its nature assignable.

Rawlinson v. Stone.  
3 Will. 1.  
2 Stra. 1260.  
S. C.

So a bill of exchange may be indorsed to an executor or administrator as such, and be sued for by such executor or administrator: as in payment of a debt due to the estate of a testator or intestate.

King v. Thorn.  
Mic. 27 G. 3.  
B. R.  
1 Term Rep. 487.

“ 4. If a note or bill of exchange is made payable to two persons, both should indorse it, unless they are partners.”

For

Carvick v.  
Vickery.  
Dougl. 630.  
In not.

For where the bill in question was drawn by two persons of the name of *Maydwell*, payable to their own order, they were not partners, and *one of them only indorsed it* to the plaintiff. In an action against the defendant (the acceptor) Lord *Mansfield* nonsuited the plaintiff, holding that *both names* to whom the bill was payable, should have been indorsed. On a motion for a new trial, the court were of opinion, That as to this transaction, by making the bill in that form, "*Pay to us or our order*," they had made themselves so far partners, that the indorsement by one was sufficient. A new trial was therefore granted. At the second trial the counsel for the plaintiff offered evidence, That it was the usage and understanding of all the merchants and brokers in *London* that the indorsement should be made by both payees: the admission of this evidence was opposed, but Lord *Mansfield* did not think the question so settled as to preclude the evidence offered; it was therefore admitted, and there was a verdict for the defendant.

Smith & alt. v.  
Pickering.  
Sitt. West. Hill.  
31 G. 3. &  
Pasch. 31 G. 3.  
B. R. MSS.

5. In this case *Hill* and *Richardson*, being partners and indebted to the plaintiffs, drew a bill of exchange, payable to their own order on one *Pickering*; and in part payment of the debt so due to the plaintiffs, delivered to them this bill: but at that time forgot to indorse it, and the mistake was not observed at the time by the plaintiffs. *Pickering* accepted the bill in the hands of the plaintiffs, and promised payment; but before he had paid it, *Hill* and *Richardson* became bankrupts, and the omission of the indorsement being discovered, the plaintiffs applied to them, and they indorsed the bill after they had become bankrupts. An action being brought against the acceptor, it was objected, That this action could not be maintained, the plaintiffs deriving their title by indorsement from the bankrupts: but it was ruled by Lord *Kenyon*, That the plaintiffs having taken the bill for a valuable consideration, obtained thereby a complete property; and that the indorsement was merely the formal part (the evidence of the transfer) and so might be made by the parties after they became bankrupts. On a motion for a new trial, the court of *K. B.* concurred in the judge's opinion.

## 2. In what manner the Indorsement is to be made.

" 1. The usual mode of indorsing a note or bill is by these words, *Pay the contents to A. B.* and signed by the payee: and such indorsement transfers the property to *A. B.* So also may a bill or note be indorsed by a blank indorsement of the name alone; but there must be some evidence that it is taken by the indorsee as property: " for

"for the mere indorsement of the name does not of itself transfer the property in the bill or note."

As where the plaintiff having a bill of exchange payable to him or order, on the defendant, sent it to his friend *Clark v. Pigot*, *1 Salk. 126.* *J. S.* to get it accepted, having first put his name on it; *J. S.* got it accepted; but it not being paid, the plaintiff brought his action against the defendant; it was contended that it would not lie, the property being transferred by the indorsement to *J. S.* But *Holt, Ch. J.* held, That *J. S.* had it in his power to act either as indorsee of the bill, by writing to that effect above the plaintiff's name, or as his servant, by writing an acquittance to the defendant above it, in like manner: that not having written an indorsement above, he took the note to receive the money as servant to the plaintiff, and so the action well lay. *Lucas v. Haynes*, *Salk. 130. S. P.*

And therefore where in the action by the payee, the note being produced, had his name on the back of it; and it was insisted, that *that* was an indorsement. The judge allowed it to be struck out in court; for being in blank, no property was transferred. *Theed v. Lovell*, *2 Stra. 1103.*

2. A bill of exchange cannot be indorsed over for a part of the sum it is drawn for, for that would subject the drawer or acceptor to several actions, upon a contract which is entire. But the holder may have his action for part, if he acknowledge satisfaction for the rest. *Hawkins v. Cardy*, *1 Ld. Ray. 360. Salk. 65. S. C.*

Though the indorsee has received part of the money from the indorser of a bill of exchange, he may, nevertheless, have his action against the drawer of the bill for the whole amount of it, and the indorser have his remedy, for so much as he has paid, against the indorsee; for if the action was brought by the indorsee only for the residue, the indorser who paid him would have his action against the drawer for the part he had paid, and so multiply actions. *Johnsen v. Kenyon*, *2 Will. 261.*

But if the indorsee of a bill of exchange receives part of the money from the drawer, he can only recover the residue from the acceptor; for a bill of exchange being an order from the drawer to the acceptor to pay so much money, when the drawer pays part, it operates as a countermand of the payment of so much of the money, and a release to the drawee. Therefore, where the plaintiff declared as indorsee of a bill for 95*l.* against the defendant as acceptor, the drawer had paid 60*l.* and the acceptor now paid the remainder into court, the defendant had a verdict, Lord *Loughborough* holding the above doctrine; which was confirmed by the court of C. P. *Bacon v. Searles*, *H. Blackst. Rep. 88.*

And the reason of the difference of the two cases seems to be, That as the bill was created by the drawer in consideration of the amount first advanced by the payee, or, as payment of a debt to payee, and he is *ultimately liable*, he shall be allowed to discharge the bill in any manner he pleases: but as payment must ultimately come from him, to allow a partial payment by any other party whose name was on the bill, would be to multiply actions.

“ 4. If a bill of exchange or promissory note is drawn payable to any person or order, and is not paid, *but is taken up by the drawer*, such bill can never regularly after be indorsed, it is *functus officio*, and no longer negotiable.”

Beck v. Robley.  
H. Blackst. Rep.  
89. For where in an action against the defendant as acceptor of a bill of exchange, it appeared to have been drawn originally by one *Brown* in favour of *Hodgson*, on the defendant, who accepted it; but not being paid when due, *Hodgson* returned it to *Brown*, who paid the money. Afterwards *Brown* indorsed it to the plaintiff, who sued the defendant; when it was resolved, That the acceptor was discharged by *Brown* taking up the bill, by which there was an end of its negotiability.

Plenius 3 Term  
Rep. 82.

“ Though the rule is laid down thus generally in this case, yet it must be taken with some qualification; for the rule seems rather to be, that where a bill or note is indorsed after it is due, as that is a suspicious circumstance, it is incumbent on the party who is to receive it, to satisfy himself that it is a good one, as otherwise he shall be presumed to take it only on the credit of the person from whom he received it. And therefore if the indorsee of a bill or note, so indorsed after it is due, sue the acceptor of the bill, or maker of the note, the defendant shall be allowed to go into every circumstance of defence he might have had against the original party to whom it was payable.”

Brown v. Davis.  
3 Term Rep. 80.  
Taylor v.  
Mather.  
E. 27 Geo. 3.

Therefore where the defendant was the maker of a promissory note, payable to one *Sandal* or order, and he had indorsed it to one *Taddy*, who had noted it for non-payment, and afterwards the defendant paid *Sandal*, but neglected to take up the note. *Sandal* having paid *Taddy*, got the note again, and passed it to the plaintiff long after it was due, who now brought his action against the defendant. It was resolved, That the defendant should have been admitted to give evidence of those facts; that the noting was a strong circumstance of fraud, and that slight evidence should weigh with the jury to presume that the indorsee was acquainted with the fraud.



So a bill at first negotiable, may, by the indorsement, be restrained from being further negotiable.

Ancher v. Bank of England, ante.

5. By stat. 17 Geo. 3. 30. All indorsements of promissory notes or bills of exchange, under 5*l.* drawn pursuant to the directions of the statute (*ante*, fol. 28.) must be indorsed by the words "Pay the contents to *A. B.* or order," or such shall be void.

### 3. Of the Effect of the Indorsement.

1. "The indorsement always follows the nature of the bill or note so indorsed."

As where the bill was drawn by *R. Clive*, payable to *Campbell* or order, and indorsed by him to *Ogilby*, omitting the words *or order*, who indorsed it to the plaintiff, it was adjudged that the bill was further negotiable, and not confined to *Ogilby*, to whom it was indorsed by name only, though these words *or order* were wanting, for that the indorsement followed the nature of the original bill, which was negotiable; that therefore the plaintiff might recover as indorsee of *Ogilby*.

Edie v. East India Company.  
2 Burr. 1216.  
1 Black. Rep. 295. S. C.

So where the plaintiff declared on a bill of exchange, indorsed to him or order, and on producing the bill, the words *or order* in the indorsement were wanting, it was adjudged to be no variance, for the bill being drawn originally payable in that form, the want of those words in the indorsement did not alter its nature, but it remained negotiable in the same form still.

Acheson v. Fountain.  
1 Stra. 557.  
More v. Manning.  
Com. 312.

"So an indorsement may be made to a person's order only, and such shall be good as an indorsement to the person himself."

For where a bill of exchange was indorsed thus, by the payee, "Pay the contents to the order of Mr. *Fisher*," and he brought his action as indorsee, to which there was a demurrer for cause, that the indorsement not being to himself in person, that he could not bring the action: but it was over-ruled, as this was the usual form among merchants, and an indorsement to his order transferred the property to himself.

Fisher v. Pomfret.  
Carth. 402.

2. But the indorser of a bill of exchange may charge himself with terms different from the tenor of the bill as at first drawn, for he is as a new drawer, and may be declared against as assuming to pay according to the terms of the indorsement, which would be bad against the drawer: as if a bill be payable the first of May, he can indorse it as payable

Smallwood v. Vernon.  
1 Stra. 478.

indorsee should have made further enquiries, and attempted to have found him out.

Arg. Dougl.  
497.

So it has been frequently ruled by Lord *Mansfield*, that is no excuse for not demanding payment from the maker of a promissory note or acceptor of a bill, and not giving notice of the non-payment, that the maker of the note, or the acceptor of a bill of exchange, *had become a bankrupt*, as many means might remain of payment, as by the assistance of friends or otherwise.

Vaughan v.  
Fuller.  
2 Stra. 1246.

But the indorser may supersede the necessity of such a demand on the maker of the note by his own act, as if he pays part of the note; for that discharges the maker totally, and subjects himself with the whole, and in such case a demand from the maker of the note was held to be unnecessary.

Hull v. Pitfield.  
2 Will. 46.

So where the indorsee sued the maker of the note, and *his bail paid the money*, it was adjudged that the indorser was clearly discharged, for it was the same as if paid by the drawer himself.

Lambert v.  
Pack.  
Salk 127.  
1 Res.

4. As every indorser is therefore as a drawer in respect to the indorsee, if the action is brought by the indorsee *against the indorser*, he is *never called on to prove the hand-writing of the drawer*; for the indorser is liable on his own indorsement though the bill was forged.

Smith v.  
Chester.  
1 Term Rep.  
654.

But if the indorsee brings an action *against the acceptor* of a bill of exchange, he must *prove the hand-writing of the first indorser*, even though there were several indorsements on it when accepted, for a bill of exchange is no payment to the person in whose favour it is drawn, unless it has been indorsed by him.

“Therefore if the name of the first indorser is forged, or cannot be proved, the holder cannot recover.”

As in the case of *Cheap v. Harley*, *ante* 5. where the payee's name being forged, the acceptor was compelled to pay the bill over again.

Mead v. Young  
4 Term Rep.  
28.

So where in an action by the indorsee against the acceptor, the case was, that the bill was drawn at Dunkirk, by one Christian, on the defendant in London, payable “to Henry Davis or order,” this was inclosed in a letter from Christian, and got into the hands of a Henry Davis, but not the person in whose favour it was intended to have been drawn. The defendant accepted the bill, and being applied to by the plaintiff, with whom Davis had dis- counted it, he acknowledged his acceptance, but after- wards

wards discovering the fraud, he refused to pay it; on action brought against him, it was resolved, that the defendant should have been allowed to have gone into evidence, that the payee's name indorsed on the bill was not the name of the real person to whom the bill was drawn payable, in which case the plaintiff could not recover, though there was no fraud in the holder, who might come *bona fide* by the bill.

But where a bill of exchange was drawn payable to a *fictitious payee, and that known to the acceptor*, as well as to the drawer, who had so drawn it, and the name of the fictitious payee indorsed on it, *with the knowledge also of the acceptor*, which fictitious indorsement was to the drawer himself or order, and he (as indorsee) indorsed the bill over to the plaintiffs for a valuable consideration, it was resolved that the acceptor should not be allowed to avail himself of the circumstance, that the payee's hand-writing as the first indorser could not be proved, since there was no person in being as payee in this case, and that known to the acceptor, when he accepted it; but he should be liable to it as a *bill payable to bearer*, or perhaps as a bill payable to the order of the drawer, or on a count, stating the special circumstances.

Gibson v. Minet  
v. Minet  
Fector.  
4 Black. Rep.  
569.

In this case the defendant and others drew a bill on the defendant alone, in favour of a fictitious payee, the name of this fictitious payee he indorsed on it to himself, and then he indorsed it over to the house of Lewis and Potter, who indorsed it over for a valuable consideration to the plaintiffs. On the same objection on the part of the acceptor, as in the last case, the court over-ruled it, and held that the plaintiff might recover on a count for money had and received, or money paid.

Tatlock v.  
Harris.  
3 Term Rep.  
174.

5. If an action is brought on a promissory note *against the maker by the person to whom it is made payable*, the defendant will be admitted to impeach the promise, and go into the consideration: as to shew it was illegal, as here, that it was given on a smuggling consideration; or to shew that it was delivered as an elcrow; *ex gr.* as a reward for procuring the defendant to be restored to an office, which the plaintiff had not effected, and so the condition was not performed: in which case the plaintiff could not recover. But when the action is *not between the original parties themselves*, as where it is *by the indorsee*, the consideration of the note shall not be allowed to be disputed. Therefore where the action was against the indorser, and *Raymond* would not suffer him to give in evidence, that

Guichard v.  
Roberts.  
1 Blackst. Rep.  
445.

Jeffries v. Austen,  
1 Stra. 674.

Snelling v.  
Briggs at Reading,  
1741. Bull.  
N. P. 274.

Collett v. Griffith. H. 2. G. 2.  
G. Hall. Buller  
N. P. 274.

that the plaintiff desired him to indorse the note, to enable him to bring an action against the drawer of the note, and had promised that he would not sue him.

"But where a person gives a note for the purpose of aiding another in fraud, as in procuring a marriage, *ex gr.* such note shall be absolute against him."

Montefiori v. Montefiori.  
1 Black. Rep.  
363.

As where the plaintiff being engaged in a marriage-treaty, the defendant who was his brother, to assist him in his designs, and to represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between them, which the defendant acknowledged to have in his hands, though in truth no such balance existed, it was resolved, That where, upon proposals of marriage, third persons make representations different from the truth, they shall be bound to make them good. Therefore the defendant having misrepresented the plaintiff's circumstances to the amount of the note, he should be chargeable with it.

Per Buller, J.  
Term Rep. 615.

"And so in the case of bills of exchange, *after indorsement*, the acceptor shall not be allowed to question the bill as forged, for he is bound by his acceptance, even though the bill was forged, from the credit it receives from the indorsee, by reason of the acceptance."

Price v. Neale.  
3 Burr. 1354.  
1 Black. Rep.  
390. S. C.

And therefore where two bills of exchange were actually forged on the plaintiff, and the defendant took them as indorsee *bona fide*, and the plaintiff had paid the money; it was adjudged that he could not recover it back from the fair indorsee.

Jennys v. Fowler.  
2 Stra. 946.

So where in an action by the indorsee of a bill of exchange against the acceptor, the plaintiff rested on the proof of the acceptance, the defendant offered to prove it a forged bill, by calling persons who knew the hand of the drawer, and who would swear they did not believe it to be his; but *Ch. J. Raymond* refused to admit this evidence from the danger to negotiable notes, and because a man might by design write contrary to his usual method, and inclined strongly to think that proof of actual forgery, would not excuse the defendant against his own acceptance, which had given the bill a credit with the indorsee.

6. "No person can be charged through the medium of a bill of exchange, as drawer, acceptor, or indorser, unless his name appears on the bill; for if the holder of a bill of exchange sends it to market, without indorsing his name on it, he sells the bill, and the person who gives cash for it, takes it on the credit of those  
"only

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"only whose names appear on it: this is, provided the holder does not know the bill to be a bad one; for if he knows the bill to be bad, he shall refund the money, on account of the imposition."

So that if a merchant having such a bill, gives it to his clerk to get discounted, *with injunctions not to put his name on it*, the master shall never be called on for the money; but if he gives it to his clerk, and *does not say that he will not indorse it*, and the clerk warrants the bill, he shall be considered as the agent for the merchant, and his act shall bind him, and the merchant shall be liable to the holder in an action for money had and received.

Fenn v. Harri-  
son.  
3 Term Rep.  
757. S. C.  
4 Term Rep.  
177.

### 2. Of Bills of Exchange, or Notes negotiable without Indorsement.

This is the case of all notes payable to bearer or to *J. S.* and bearer, which from their nature require no indorsement, but are transferrable by delivery only; in which case, the person who comes fairly by such bill or note, may bring an action on it in his own name. But where the action is so brought by the *bearer* in his own name, it is incumbent on him to prove that he gave for it a fair and valuable consideration.

3 Burr. 1521.  
Hinton's case.  
2 Show. 235.

"And it matters not how the person who possessed it came to possession of the bill or note, provided the holder who brings the action gave for it a good consideration, and came by it in the fair course of trade."

Miller v. Race.  
1 Burr. 452.

For where the mail was robbed and a Bank of *England* note taken out, which was passed by the highwayman to the plaintiff, who was an innkeeper, in the course of his business; this was adjudged to give a full and indefeasible property in the note to the inn-keeper.

Grant v.  
Vaughan.  
3 Burr. 1516.  
1 Black. Rep.  
485. S. C.

In like manner where the defendant gave to one *Bicknell*, who was his ship's husband, an order on his banker, in those words, "Pay to the ship *Fortune*, or bearer, 70l." *Bicknell* lost the note. The person who found it passed it to the plaintiff in payment of money for goods *bonafide* sold, and the plaintiff recovered in this action the amount of the bill.

"And the case is the same of a bill of exchange which passes by indorsement."

For where in an action on a bill of exchange against the defendants as drawers, the case was, that the bill was drawn by the defendants at *Halifax*, in *Yorkshire*, on

Peacock v.  
Rhodes.  
Doug. 613.  
Smith

Smith and Payne, of London, payable to one Ingham or order; Ingham indorsed it to one Daltrey, who indorsed it to one Fisher, from whom it was stolen; it was afterwards passed to the plaintiff, who was a mercer at Scarborough, in payment of goods, by a person who called himself William Brown, who indorsed it in that name. On action brought against the defendants, the plaintiff recovered, the court being of opinion, that a blank indorsement was as if made payable to bearer, and that the plaintiff having taken it in the fair course of trade, had nothing to do with the intermediate transaction, he not being privy to it.

Anon. Salk.  
126.

These decisions are founded on the consideration due to bills of exchange and promissory notes as the medium of business, whose circulation is not to be impeded. And therefore a bill if lost and found by any person, gives him no property *against the owner*, though it does against all other persons, and the owner may have trover for the bill in the finder's hands; but when it once becomes fairly transferred in the course of trade, the owner's property is from that time at an end.

"Therefore if a banker, or the acceptor of a bill of exchange, pays a bill so drawn on him, he shall not be liable to the owner of the bill, if the bill has been lost or stolen; *provided such payment has been made by them in the fair course of trade and business.*"

De Silva v.  
Fuller.  
Sitt. Lond. East.  
1776. MSS.

For where in trover for a bill, draft, or check, drawn by one Cox on the defendants, who were bankers, payable to No. 437, or bearer on demand, it was drawn the 17th of June, but dated the 18th. On the 17th the plaintiff received it, that day he lost it, and the same day (17th) it was presented to the defendants, who paid it; it was proved to be *contrary to the usual course of business, to pay drafts before the day on which they were dated*, and on that ground the plaintiff had a verdict.

I have hitherto considered those matters in which promissory notes and bills of exchange agree, viz. that negotiability which is common to both. I shall now consider those points wherein they differ; that is, the *acceptance and protest of bills of exchange.*

### 3. Of the Acceptance of Bills of Exchange.

Under this I shall consider, 1st. What shall amount to an acceptance. 2dly. Of the manner of acceptance. 3dly. Of the effect of an acceptance, and how it may be discharged.

1. *What*

1. *What shall amount to an Acceptance.*

1. A verbal acceptance of a bill of exchange shall be sufficient to charge *the acceptor*.

Lumley v.  
Palmer.  
2 Stra. 1080.

But note, that if the acceptor does not pay, in which case the payee must resort to the drawer, the acceptance must be *in writing*, in order to charge the drawer *with costs and damages*, if the bill is an inland bill of exchange by stat. 3 & 4 Ann. c. 9. and if a foreign, by stat. 9 & 10 W. 3. c. 17.

2. But the mere answer of a merchant to the drawer, "that he would duly *honour the bill*," is no acceptance except accompanied with other circumstances, which may induce a third person to take it by indorsement; but if there are any such circumstances it may amount to an acceptance, even though the answer be contained in a letter to the drawer.

Per Lord Mansfield.  
Cowp. 573.

As where other words are added to these, *they* may amount to an acceptance. As where a merchant by letter says, "*Your bill shall be duly honoured and placed to your debit*." This was adjudged to be a sufficient acceptance.

Per Lord Hardwicke.  
1 Atk. 612.

3. "The acceptance may be *an absolute or a conditional undertaking*. If a conditional one, the holder may refuse it; but if he adopts it, it shall charge the drawee when the condition is performed."

2 Stra. 1152.  
Cowp. 573.  
Julian v. Shrobbrooke.  
2 Will. 9.

"And whether an acceptance is absolute or conditional is matter of law and not of fact: and the payee must at the time of tendering it, take it in one light or other, and abide by such election; for if he conceives the acceptance to be conditional, and does any act by which he shews his dissent to such acceptance, in such case he cannot afterward sue the drawee *as acceptor*."

Therefore where the plaintiff declared against the defendant, *as acceptor*, and the circumstances were, that the bill was drawn on the defendant payable to one Lenox, forty-one days after sight; Lenox indorsed it to the plaintiff. In September the plaintiff's clerk presented the bill to the defendant for acceptance, who told him that the drawer had consigned a ship and cargo to him and another person at Bristol; but as he could not know whether the ship would arrive at London or Bristol, he could not then accept the bill; upon which the clerk said, he would leave the bill upon condition that if the defendant did not afterward

Sproat v.  
Matthews.  
2 Term Rep.  
182.

ward accept it, that he should be at liberty to note it from the time when he had first presented it. To this the defendant assented, and the bill was left accordingly. In the month of October the clerk called again, and the defendant being pressed to give an answer whether he would accept or not, said "the bill was a good one, and that it would be paid, even if the ship was lost." The clerk on this carried the bill to a notary, and noted it for non acceptance from the time it had first been tendered; the ship arrived safe in London, and was disposed of by the defendant, and then the plaintiff brought his action against the defendant as acceptor. It was resolved, That this was only a conditional acceptance, which the party had liberty to adopt or not; that having refused it by noting the bill, he was not at liberty afterwards to sue the defendant as acceptor.

In questions therefore between the payee, or indorsee, and the acceptor, the matter often turns upon what is an absolute and what a conditional acceptance. As to which it has been decided,

1. "Where the acceptance is made *with reference to some fund*, which is to provide for payment of the bill, it is a "conditional acceptance."

Pierfon v.  
Dunlop,  
Cowp. 57.

As where the drawees of a bill of exchange received a navy bill assigned to themselves, as a counter security for the payment of the bill drawn on them, and on the bill being tendered for acceptance, they said, "that they could not accept the bill of exchange till the navy bill was paid." This was held to be an undertaking to accept when the money was received on the navy bill, and when received the drawee liable.

Smith v. Abbot.  
2 Stra, 1152.

So where the defendant accepted a bill of exchange to pay it "when goods consigned to him, and for which the bill was drawn were sold," it was held to be a conditional acceptance.

2. "Where the acceptance is made *with reference to any account* between the parties, it shall be deemed conditional."

Molloy De Jur.  
Mur, 280.

As where a merchant says, "leave the bill with me, and I will look over the accounts between the drawer and me; call to-morrow, and accordingly the bill shall be accepted;" this is not an absolute acceptance, because it refers to a balance of account.

4. "Wherever the drawee gives a credit to the bill by any act whatever, that shall be deemed an acceptance, and shall bind him.

As



As where a bill was drawn by one *Newton* on *Withy* (the defendant) in favour of *Scot*, who indorsed it to the plaintiff. He tendered it for acceptance to the defendant, who underwrote thus: "Mr. *Jackson*, please to pay this note, and charge it to Mr. *Newton's* account. *R. Withy*." It was insisted that this was no acceptance, for the defendant did not mean to become the principal debtor, it was only a direction to *Jackson* to pay out of a particular fund; and if there was no fund, the money was not to be paid. But, *per Curiam*, the underwriting is an acceptance, and the mode of payment is a transaction between them two only, and it signifies not to what account it is to be put when paid.

*Moor v. Withy.*  
Trin. 10 G. 3.  
Bull. N. P.  
270.

So where the defendant on whom the bills were drawn, in a letter said, "I will pay the bills in case the owners of the ship *Queen Ann* do not; I think necessary to acquaint them, but rest satisfied of the payment." This was held to be a good and sufficient acceptance, being an undertaking at all events to pay the bill.

*Wilkinson v. Lutwidge.*  
1 Str. 648.

For an implied acceptance is sufficient to charge the drawee, and that need not be in the form of a promise, as any thing written on the bill by the drawee not expressing a direct refusal to accept, as *presented, seen, will*, if unexplained by other circumstances, be deemed an acceptance.

*Comb. 401.*

But where a person received a bill, kept it for six days, and entered on it No. 84. 5 *May*; this was adjudged not to be a sufficient acceptance, it being proved to be the custom of the drawee so to mark and enter all bills, whether he meant to accept them or not.

*Powell v. Monier.*  
1 Ark. 611.

So where a request was made to the drawee to accept a bill, and to secure himself by drawing a bill to the amount of the first on a third person, it was held that the mere act of drawing such bill as directed did not amount to an acceptance; and he having paid the bill drawn on him, and that which he had drawn on the third person being dishonoured, he recovered back again the money he had paid.

*Smith v. Nissen.*  
Trin. 26 Geo. 3.  
B. R. Term  
Rep. 269.

## 2. Of the Manner of Acceptance.

1. "No person (as wife or servant) can accept a bill of exchange so as to bind the master without lawful authority (as a letter of attorney or the like) unless such person has usually done so in the absence of the master, and for

*Molloy 284.*

"his

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"*his account.* And if such person accepts a bill generally drawn on him, though on his master's account, it shall bind the person himself, and not his *principal.*"

Thomas v.  
Bishop.  
2 Stra. 915.

For where the plaintiffs were indorsees of a bill of exchange, drawn in these words, "Thirty days sight pay to T. S. or order, 200*l.* value received, and place the same to the account of the York-Buildings Company, as per advice from Charles Mildmay. To Mr. H. Bishop, Cashier of the York-Buildings Company, at their house, Winchester-street, London. Accepted 13 June, 1732, H. Bishop," it was proved for the defendant, That the letter of advice was addressed to the Company, that the bill was brought to their house, and that he was ordered to accept it, as he did others. But it was resolved, on a motion for a new trial, that the defendant was personally liable; for it was drawn on him, accepted generally, and not as a servant to the company; to whose account he had no right to charge it till he had actually paid it; that this being an action by an indorsee, it would be of dangerous consequence to trade to admit evidence from extrinsic circumstance, as the letter of advice. That this differed widely from the case of a bill drawn, addressed to the master, and underwrote by the servant, in which case the servant would not be liable, but his acceptance be considered as the act of the master: that a bill of exchange was a contract to bind the parties, and the whole of it should appear in writing; that there was nothing in writing to bind the company, nor could any action be maintained against them on it; for that the address to the defendant was only to denote the person, and his place of abode, with more certainty. But they said, that had the action been by the payee T. S. it might have been different, as he was privy to the transaction, and tendered the bill to the company; but the plaintiff being a stranger, that these circumstances could not be considered; so he had judgment.

Pinkney v. Hall.  
Salk. 126.

2. Where there are two joint traders, and one accepts a bill drawn on both for himself and partner, it binds both if it concerns the trade: otherwise, if it concerns the acceptor only in a distinct interest and respect.

Wigersloff v.  
Keene.  
1 Stra. 214.  
Smith v. Scar.  
East. 14 G. 2.  
Buller N. P.  
271.  
Molloy 281.

3. Drawee of a bill of exchange may accept it as to part, or he may accept it to pay half money and half goods, or when goods of the drawer are sold; but the payee may refuse such a partial acceptance and protest the bill; that is, if the bill is accepted in part, there must be a protest, if not for the whole sum, at least for the part unpaid. After payment there must be a protest of the residue.

4. "The

4. " The acceptance of a bill should be *upon the bill itself*; but there may be a *collateral agreement* made before the bill has existence, as an *agreement to accept*; and *it shall bind the party so agreeing.*"

As where the plaintiffs who were merchants in *Holland*, agreed to accept a bill of one *White's* on them from *Dublin*, on condition that *White* would give them a credit on some house in *London* to the amount of the bill. *White* named the defendants; upon which the plaintiffs paid the bill drawn by *White*, and then they wrote to the defendants, to know if they would accept a bill on them on *White's* account: they agreed to do it. In the interim *White* failed, before, in fact, the plaintiffs had drawn on the defendants; upon which the defendants wrote to them not to draw, as they would not accept their bill; notwithstanding which the plaintiffs did draw on them, and now brought an action for the amount, when it was adjudged, that this was a sufficient agreement to accept, and bound defendants to the payment of plaintiffs bill so drawn, they having previously accepted and paid the bill drawn on them by *White*.

" But where there is such a previous agreement to accept, if it is conditional in any respect, those conditions must be strictly performed, or the agreement shall not be binding."

As where a partner of an house in *London* being then at *Dominica*, wrote to the defendant, his partner in *London*, that the house of *Vance, Caldwell, and Vance*, in *Dominica* having purchased a quantity of prize tobacco, that he had agreed, on their giving the defendant orders to insure the quantity sent, and sending the bills of lading consigned to him in *London*; that their bills of exchange, drawn at the rate of 80*l.* per hogthead of tobacco, should be accepted by the defendant, it was held, that this did not bind the partner absolutely to accept; for it was conditional, *That tobacco be consigned, that it is of such a value, and that an insurance be made.* If any of these failed, there was no binding agreement to accept, and so to charge the drawee; and here in fact, the tobacco's only producing 40*l.* per hogthead, the defendant was held not to be liable.

5. A bill may be accepted *after the time of payment is elapsed*, and the acceptor shall be liable; for the substance of the promise is to pay the money, which is done by the acceptance.

But in such case, the declaration should regularly state a promise to pay generally, not *secundum tenorem billæ*.

So

Molloy 283.

So a bill may be accepted to be made payable at a longer day than that on which it is drawn payable, and this shall bind the acceptor.

### 3. *Of the Effect of an Acceptance, and how it may be discharged.*

In case of Pillans  
and Rose v. Van-  
microp & alt.  
3 Burr. 1663.

1. "By the acceptance of a bill of exchange the acceptor makes himself so absolutely liable, that he can never, over the want of consideration or of goods in his hands belonging to the drawer: for the law of merchants knows no *nudum pactum*."

Maber v.  
Massias.  
2 Blackst. Rep.  
1072.

And therefore where there were dealings and an account current between the drawer and drawee as his factor, and a balance in fact due to the drawee, and he accepted a bill of the drawer's drawn on the goods in his hands, it was held that this should only be postponed to *prior acceptances*, and that he should not be allowed to *hold the goods for his own balance*, for if he meant to have reserved his own balance, he should have made a *special acceptance*.

Wilkinson v.  
Lutwidge.  
1 Stra. 648.

Therefore where the action is against the acceptor by the payee, he is not obliged to prove the drawer's hand; for by the acceptance the acceptor has acknowledged the hand of the drawer as his correspondent. But the acceptor is not precluded from proving it not to be the hand of his correspondent.

Potter v. Tubb.  
Sarum Lent Ass.  
1785. MSS.

So where in an action by the payee of a bill of exchange against the acceptor, the defence attempted to be set up was, that the consideration of accepting the bill was *a debt due by the acceptor to the drawer for smuggling goods*; but it was ruled (by Buller, Just.) that this could not affect the plaintiff, unless the bill had been given to *him* for a smuggling debt; and that although the plaintiff should be proved to have known that the consideration between the drawer and the acceptor was illegal, it would make no difference as to him.

Symonds v.  
Farminter.  
2 Wilk. 185.

2. *An acceptance is an acknowledgment of debt to the drawer*, as having effects in his hands to the amount of the bill, and therefore where the drawee of a bill of exchange accepted it, he was held liable to the drawer, he not having paid the bill when due, which was returned protested, and paid by the drawer. But it seems that he might have accepted it *for the honour of the drawer*; in which case he would not have been liable.

2. *As to how an Acceptance may be discharged.*

It has been decided, 1. "The acceptor of a bill of exchange is in no case discharged from the payment of it, unless he can prove that the bill was paid by the drawer, or he receives an express discharge from the holder."

Therefore, where the indorsee of a bill of exchange brought an action against the acceptor, and it appeared that there was no demand of payment until three months after the bill became due, and the drawer was then insolvent, it was ruled by Lord Mansfield, That this was no defence, for the acceptor of a bill of exchange or maker of a promissory note remains *always liable*; acceptance is a proof of having effects in his hands, and he ought never to part with them, unless it appears that the drawer had provided another fund by paying the bill himself.

Anderfon v. Cleland.  
Sitt. East. 1779.  
MSS.

"So the discharge from the holder must be *express*; an implied discharge is not sufficient."

For where it appeared that in fact the bill had been accepted by the defendant, merely to accommodate one Wheate the drawer; the payee had indorsed it to the plaintiff. When it became due the plaintiff, understanding that it had been really an accommodation-bill, for which the defendant never had any value, *applied to one Ready (Wheate's attorney) for payment.* Dunster, the defendant, wrote to the plaintiff, thanking him for not proceeding against him, and mentioning that he had been informed that Wheate had taken up the bill: but it did not appear that the plaintiff sent any answer to this. After this *Dingwall received interest upon the bill from Wheate*, and also payment of another bill drawn at the same time by the same parties; the plaintiff suffered several years to elapse without calling on the defendant, or treating him as his debtor. It was argued for the defendant, that this was from the circumstances an implied discharge of the drawer. But it was held that *the discharge must be express, in order to discharge the acceptor.*

Dingwall v. Dunster.  
Doug. 235.

Therefore where the plaintiff who was indorsee, first arrested the defendant the acceptor; but finding that no consideration had been given for the acceptance, his attorney took a security from the drawer, and then wrote to the defendant, "that he had settled with the drawer, and *the defendant need trouble himself no more about it.*" This was held

Black v. Peele.  
Doug. 236.

held to be an absolute discharge of the acceptor, and that he could never after be called on for payment.

" But where the discharge is not in express terms, it seems to be matter proper to be left to the jury, whether what has been done by the holder shall amount to a discharge of the acceptor or not."

*Ellis v. Galindo.*  
*Dougl. 238.*

For where in *assumpsit* on a bill of exchange for 30*l.* the drawer and acceptor were brothers, and the holder (the plaintiff) when the bill was due, received of the drawer 3*l.* 1*s.* who at the same time indorsed on the bill to this effect, "*Received on account of this bill 3*l.* 1*s.*; remaining due 26*l.* 5*s.* I promise to pay Mr. James Ellis, within three months from the date hereof.*" This was signed by *James Galindo*, the drawer; the balance was never paid, and at the distance of three years the action was brought against the acceptor. The cause was tried before Lord Mansfield, who nonsuited the plaintiff. On a motion for a new trial, the court were of opinion, That it being a question of intention arising out of circumstances, that it ought to have been left to the jury, the bill being probably an accommodation one, the drawer and acceptor being brothers.

2. " The laws of the country where the bill of exchange is accepted, shall determine how far the acceptance binds; and if by those the acceptor has been discharged, he shall be so here."

*Burrows v.*  
*Jemino.*  
*2. Stra. 773.*

Therefore where a bill was accepted at *Leghorn* by the plaintiff, and by the laws of that place, if a bill is accepted, and the drawer fails, and the acceptor has not sufficient goods of his in his hands, he shall be discharged from his acceptance, which here was the case; and the acceptor had instituted a suit in *Leghorn*, and his acceptance vacated by sentence there. It was held in Chancery on a bill for an injunction (the plaintiff being sued at law in *England* on his acceptance) that the acceptance being declared void by the laws of that place, was void every where, and the acceptor discharged.

3. Where the drawee of a bill of exchange enters into an agreement to accept on certain conditions, as in consideration that goods of a certain value shall be consigned to him, which is a virtual acceptance, if the condition is performed; if before he has absolutely accepted the bills, the holder of the bill takes the goods himself and sells them, it is a discharge to the drawee of such virtual acceptance.

For

For where the agreement to accept was on condition, that tobacco of 80*l.* value per hoghead was sent to the drawee's, and an insurance ordered by the drawers of the bills of exchange, and they had consigned the tobacco accordingly, and drawn the bills in favour of the plaintiff, and he having applied to the drawee to accept, the drawee apprehending the tobacco not to be worth 80*l.* per hoghead, had refused to accept the bills; upon which the plaintiff took the bill of lading, and the policy which had been made on the tobacco, and when it arrived, sold the tobacco himself, it was clearly held that this discharged the drawees.

*Mason v. Hunt.*  
Doug. 284.  
3 Ref.

And note, That when a person has accepted a bill of exchange, he ought not to pay it till it becomes due; because till that time it is subject to a countermand by the drawer, and therefore if a countermand comes after the drawee has paid the bills, the drawer is not answerable.

*Molloy 251.*

#### 4. Of the Protest of Bills of Exchange.

Bills of exchange are to be protested either for non-acceptance when tendered, or for non-payment when due.

In the case of *foreign bills of exchange*, protests were by the custom of merchants at all times in use.

In the case of *inland bills of exchange*, the first protest allowed was for non-payment, and was given by stat. 9 & 10 W. 3. c. 17. it enacted, 1. "That bills of exchange drawn and dated from any place in England for 5*l.* or upwards (in which should be expressed that they were for value received) drawn payable a certain number of days after date, may after acceptance (which should be in writing) if not paid within three days, be protested before a notary, or other substantial person of the place, before two witnesses."

*Barnaby v. Rigall.*  
Cro. Car. 302.  
Salk. 131.

This statute, in order to entitle the holder of the bill to make a protest, requires that the acceptance shall be in writing. It therefore often happened that the acceptor would accept verbally, but not in writing, so that no protest could be made. To remedy this, the first protest of inland bills of exchange for non-acceptance was introduced by stat. 3 & 4 Ann. c. 9. which enacted, "That if the person on whom an inland bill of exchange is drawn refuse to accept it in writing, the holder of the bill shall protest it for non-acceptance." But this statute made a change as

to the bills upon which a protest was required for non-acceptance or non-payment, requiring the protest of non-acceptance only in the case of *bills drawn for 20l. or upwards*, and in which was expressed that they were for value received.

And with respect to the notice necessary to be given, it is enacted by stat. 9 & 10 W. 3. c. 17. s. 2. "That the protest shall be notified within fourteen days to the party from whom the bills were received, who (upon producing such protest) shall repay such bills with interest and charges of protesting; and in default of such protest, or due notice within the days limited, the person so failing shall be liable to all costs, damages, and interest."

By stat. 3 & 4 Ann. s. 9. c. 5. it was enacted, "That no acceptance of any inland bill of exchange shall charge any person unless underwritten or indorsed, and if not so underwritten or indorsed, no drawer shall pay costs, interest or damages, unless protest be made for non-acceptance, and such protest or notice thereof be sent within fourteen days to the person from whom such bill was received; and if such bill be accepted, and not paid within three days after due, no drawer shall pay costs, damages, or interest, unless protest be made as aforesaid, or notice given; nevertheless, the drawer shall be liable to payment of costs, damages, and interest if any protest be made for non-acceptance or non-payment, and notice given or sent."

Harris v. Benson.  
1 Stra. 910.

And therefore in an action against the drawer by the holder of an inland bill of exchange which had been accepted, but not paid when due, and he had made no protest, it was adjudged that under this statute, in an action against the drawer, that no interest could be recovered: the drawer would then have had it as for money lent, and that appeared to be the consideration of the bill; but the *Ch. Justice* said it had never been allowed barely for money lent without a note: so the plaintiff had judgment for the note, but without interest.

"For in such case of neglect of making the protest, the right to recover the amount of the bill is no way affected, it only goes to the interest and costs."

Porough v. Perkins.  
1 Salk. 131.  
6 Mod. 81. S.C.

For the want of a protest is no bar to an action by the holder of an inland bill of exchange against the drawer: neither is it necessary for the holder to set out a protest in his declaration.



" And where a bill of exchange is refused to be accepted, an action *immediately* lies against the drawer."

For where a foreign bill of exchange was drawn payable one hundred-and-twenty days after sight, and when it was tendered for acceptance it was refused: upon this an action was immediately brought against the drawer. At the trial the defendant objected that he was not liable till the end of one hundred-and-twenty days, and offered to call evidence that the custom of merchants was so; but Lord *Mansfield* said the law was clearly otherwise, and refused to hear the evidence: so the plaintiff recovered.

Bright v. Purrer.  
Sitt. G. Hall.  
Trin. 1765.  
Bull. N. P.  
269.

This statute therefore (9 & 10 W. 3.) gives damages against the holder of the bill if he does not give notice to the drawer, and any damage arises in consequence: but the stat. of Ann. f. 5. deprives the holder of damages, interest, and costs, if he neglects to protest, either for non-acceptance or non-payment, and give notice within fourteen days.

As to protests, these points are settled:

1. " If a bill is not accepted, it should *immediately* be protested and notice given to the drawer: for it is not sufficient to give notice of the *non-acceptance* when the bill becomes payable."

For where the defendant drew a bill in the *West Indies* on T. in London, at sixty days sight, payable to W. S. or order; he indorsed it to the plaintiff, who presented it for acceptance, and was refused: the plaintiff then noted it for non-acceptance, *but did not protest it for the end of sixty days*, when he protested it for non-payment; and then wrote to the defendant and to his agent notice of the non-acceptance. Afterward, having brought this action against the defendant the drawer, he was nonsuited: for by not sending the protest for non-acceptance, he had made himself liable. And Note, The bill should be noted for non-acceptance the day it is refused; and when the protest is drawn, it may be dated that day.

Goofrey v. Mead.  
West. 1751.  
Buller N. P.  
271.

" But though in general it is true, that in the case of foreign bills of exchange a protest for non-acceptance is necessary, and notice of non-payment given to the drawer, in order that he may withdraw his effects out of the hands of the drawees; yet, *if it be proved that there were no effects of the drawer's in the hands of the drawees*, no such notice is necessary."

For where the plaintiff declared as payee of a bill of exchange, at forty days sight for 80l. value received, for the

Rogers v. Stephens.  
2 Term. Rep.  
1755.

use of *Wm. Calvert*, drawn by the defendant on Mess. *Berbeck and Black, London*; and which on being tendered for acceptance, was refused, for which it was then noted for non-acceptance, and afterwards protested for non-payment, the defence set up was *want of a protest for non-acceptance, and notice to the drawer*: this was rebutted, by shewing that neither at the time or afterwards the *drawees* had any effects of the drawer's in their hands. Lord Kenyon ruled this to be a complete answer, and that, under those circumstances, a protest for non-acceptance and notice was unnecessary; the plaintiff recovered, and on a motion for a new trial it was refused, the direction being right.

S. C.

So though the drawer being entitled to notice, yet he may waive the want of it by a *subsequent promise*, as here, by saying "the bill must be paid."

Dehors v.  
Harriot.  
Show. 163.  
2 Ref.

2. Where a bill is lost, and a new bill cannot be had from the drawer, a protest may be made, *on a copy*, particularly where the refusal of payment was not for want of the original bill, but merely for another cause; so that the party who was to pay did not insist on the original bill's being delivered up. But if a bill is lost, and the drawer can be resorted to for a new bill, there a protest cannot be made on a copy, and by stat. 9 & 10 *W. 3. c. 17*. "If any inland bill of exchange is lost or miscarries, within the time limited for payment of the same, the drawer shall give other bills of the same tenor and date, security being given to indemnify him if the first bill is found."

Taffel and Lee  
v. Lewis.  
Ld. Raymond,  
743.

3. By the custom of merchants there are three days of grace allowed to bills of exchange, and the bill is not to be protested till those three days are expired. But if the last is a *Sunday* or great holiday, the payee ought to demand the money on the second day; and if not paid, protest the same day, or it is at his own peril.

Brown v. Har-  
raden.  
4 Term. Rep.  
148.

So in the case of *promissory notes*, there are three days of grace allowed on them, for the stat. 3 & 4 *Ann. 9*. which first made them negotiable, put them *in every respect* on the same footing with bills of exchange.

Molloy 285.

4. If a bill of exchange is accepted and the party dies, yet there must be a demand on the executors or administrators; and if the bill is payable even before they can be appointed, yet should a protest be made.

Buller N.P. 271.  
Molloy 285.

5. If a bill is drawn on a person who lives in the country, and he is not to be met with, upon which his friend  
*accepts*

*accepts it for his honour*; this acceptance shall bind the person so accepting to the payment of the money; but the bill should be protested for want of acceptance by the original drawee, for as the drawee might have effects of the drawer in his hands, the drawer ought to have notice in order to secure them.

6. If a bill be left with a merchant to accept, he to whom it is payable, in case it be lost, is to request the merchant to give him a note for payment of the money according to the time limited by the bill; otherwise there must be two protests, one for non-acceptance, the other for non-payment. Buller N. P. 271. Molloy 285.

7. The protest is made before a notary public in case of non-acceptance or non-payment; to his protest all foreign courts give credit, and the protest is evidence that the bill is not paid. But in *England* the bill itself must be shewn as well as the protest, because the whole declaration must be proved: and when a bill is returned protested, the drawer of the bill is obliged to answer the money and damages, or to give security to answer the same beyond sea, within double the time the first bill had to run. But in *Molloy* 283, it is said, he shall only have as much time as the first bill had to run. Buller N. P. 270.

8. The stat. 9 & 10 W. 3. 17. by which protests of bills of inland exchange were first given, mentions bills payable for many days *after date*, it therefore does not extend to bills payable *after sight*. Therefore where an inland bill of exchange was so drawn, and not being paid when demanded, a sum of two shillings and sixpence was demanded for noting it, it was adjudged that no such charge was demandable against the acceptor. Leffly v. Wills. 4 Term Rep. 171.

Having thus far considered the nature and negotiability of bills of exchange, we shall conclude with the cases on the head.

## 5. Of the Nature of Payments by Bills of Exchange or Promissory Notes.

Payment by bill of exchange was formerly deemed to be no discharge for a precedent debt, unless there was an express agreement that it should be so: as to inland bills, it is now enacted by stat. 3 & 4 Ann. c. 9. s. 7. that "if any person accept such a bill of exchange for and in satisfaction of a debt, the same shall be esteemed a full and sufficient discharge, if the person accepting such bill for his debt, does not take his due course by endeavouring to get the same" Clarke v. Mundal. Salk. 124. 3 W & M. Temp.

*"same accepted and paid, and made his protest for non-payment  
"or non-acceptance."*

But if the holder of the bill of exchange or promissory note does use due diligence to get payment of the bill or note, and follows the direction of the statute; if the bill or note is not paid, he does not sustain the loss. The cases therefore upon this head turn upon the question, What shall be deemed due diligence to get the money from the acceptor of a bill or maker of the note? (for the law as to these in respect to laches is the same) and it goes on this principle, that by keeping possession of the bill or note after it becomes due, without getting the money from the acceptor or person who is first liable to the payment, it is giving an implied credit to such person, and by not giving notice (in case of his failure) preventing the indorser or person who paid away the note from getting the money, or otherwise securing himself.

### 1. *As in the case of Promissory Notes.*

*Anderfon v.  
George.  
2 Burr 353.  
Tindal v.  
Brown.  
1 T. Rep. 167.  
S. P.*

The plaintiff in this case sold goods to the defendant, who paid him with a promissory note of *A.*'s: the plaintiff demanded the money from *A.* but gave him time repeatedly till *A.* failed. It was adjudged that the loss should fall upon the plaintiff, who by so giving credit had discharged the defendant.

*Kellock v.  
Robinson.  
4 Stra. 745.*

So where the indorsee of a promissory note received part of the money from the drawer of the note, it was held to be a taking upon himself to give the whole credit to the drawer of the note, and absolutely to discharge the indorser.

### 2. *In the case of Bills of Exchange.*

*Gee v. Brown.  
4 Stra. 792.*

In an action on an inland bill of exchange by the indorsee against the drawer, it appeared that the bill was due the 14th of May; but that upon a promise of payment, the indorsee gave the acceptor time till the 20th of May, and so on at different times till the 7th of June, when the acceptor failed: and there being no notice to the drawer, the loss was adjudged to be against the indorsee.

I shall now consider the particular cases in which the holder of the bill shall be charged with the loss, by reason of

of his neglect, or be exempt from it from having used a due degree of diligence.

1. "Where a bill of exchange is drawn on any person, it is presumed that the drawee has effects of the drawer's in his hands to the amount of the bill; if he therefore *refuses to accept it, notice must be given to the drawer*, in order that he may take steps for his own security; and if such notice is not given, and the drawee fails, the payee or holder of the bill must stand at the loss. So in the case of indorsed bills, like notice must be given to the indorser of the drawee's refusal to accept the bill; because that may deprive the indorser of the means of getting the money from the drawer, or from the prior indorsers."

St. 3 & 4 Ann.  
c. 6. s. 7.

For where the defendants who were payees of a bill of exchange, indorsed it over to the plaintiff before it had been accepted, and on being tendered for acceptance by the plaintiff, the drawee refused to accept it; the plaintiff gave no notice of this for three weeks to the defendants; and at the end of three weeks the drawer failed: the loss was adjudged to fall on the plaintiff, for as the drawer was liable to the defendants who were payees, and he continued solvent for three weeks: if the plaintiff had given notice, the defendants might have obtained the money from the drawer, and therefore the plaintiff should suffer for his own neglect and laches.

Bliffard v. Hurst  
& alt.  
5 Burr. 2670.

But where it appears that *there were no effects of the drawer's in the drawee's hands*, so that no possible loss could accrue to the drawer from want of notice, as if drawn fraudulently for a blind or delay, where the parties have no dealings, there the payee or indorsee shall not stand at the loss of the amount of the bill from not having given notice; for there the foundation of the rule fails (*vide* this case *plen. chapt. of trover*, & *ante* 51), and this decision has since been often recognized.

Bickerdike v.  
Bollman.  
1 Term Rep.  
405.

"And though in such case the indorser makes a proposal or promise to pay, *if made under ignorance of the holder's laches*, it shall not operate to charge him."

For where this action was brought by the indorsee against the indorser, and the circumstances were that a bill of exchange was on the 4th of November, 1786, drawn by one Lutwich, on John Rutter, in favour of the defendant, at sixty-five days after date, the defendant indorsed it to the plaintiff, who tendered it to Rutter for acceptance

Goodall v.  
Dolley.  
1 Term Rep.  
712.

on the 8th of November, when it was refused, the plaintiffs never gave any notice of the refusal, till the sixth of January, when by letter, the plaintiff informed the defendant merely of the return of the bill, but no circumstance of the tender and refusal by Rutter; the bill expired on the 11th, and the next day the defendant made a proposal to pay the bill by installments; Heath, Justice, before whom the cause was tried, was of opinion, That this proposal being made under ignorance of the circumstances of the case, that the defendant was discharged by the laches of the plaintiff. On a motion for a new trial, the court held, 1st. The judge's directions to be right: 2dly. Evidence being offered in order to obviate the necessity of notice, that Rutter was insolvent, and so the drawer could receive no injury from want of notice; the court held, that had the action been against the drawer, that that might be material, but could not be so when against the indorser.

“ And on the same principle, where payment is made  
 “ by any draft on a third person, it ought to be immediately  
 “ tendered for acceptance or payment; for though the drawee  
 “ may be solvent when the draft is drawn, if it is kept  
 “ long untendered for acceptance, he may become in-  
 “ solvent.”

Chamberlyn v.  
 De la Rive.  
 2 Will. 353.

Therefore, where the defendant being indebted to the plaintiff, paid him by a draft on one Heddy, payable a few days after date, and the plaintiff held the bill for four months, without applying for payment. Heddy afterwards became insolvent. It was adjudged that the loss should fall on the plaintiff for his neglect.

2. “ Where bills have been accepted and paid away, or  
 “ promissory notes passed in like manner, the law is the  
 “ same.”

“ The acceptor of a bill of exchange being at all times  
 “ liable (ante 46.) no question can ever arise on the cir-  
 “ cumstance of loss, except in the case of his insolvency.  
 “ So in the case of promissory notes, the only question  
 “ that can arise there, is, when the maker becomes insol-  
 “ vent.”

How far the parties are liable or discharged, it has been decided.

1. “ Every payee or indorsee should apply for payment  
 “ of an accepted bill as soon as it is due, or in case of a  
 “ loss he must sustain it; for by holding it beyond the time,  
 “ when it is payable, it is giving a new credit to the ac-  
 “ ceptor or maker of the note.”

The

The bill in question was at six days sight, accepted the 8th of February, and by the three days of grace was payable the 17th, which was on a Saturday; the bill was not then tendered, and the acceptor stopped the Tuesday following: it was adjudged that the drawer was discharged at the end of the three days of grace.

Coleman v. Sayer.  
2 Stra. 829.

For if the bill is kept for a long time it shall be presumed to be paid, because there is a trust between the parties, and it may be prejudicial to commerce if a bill may rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between him and the drawee.

Allen v. Dockwra.  
Salk. 127.

"So in the case of promissory notes, the maker of the note should be applied to for payment when it becomes due, or the holder, in case of a loss, must suffer it."

For where the third indorsee of a promissory note kept it for two months without receiving the money from the maker: in an action against the first indorsee without notice, the plaintiff was nonsuited for his neglect, in not getting the money from the maker of the note when it became due.

Pepys v. Sir John Lambert.  
1 Stra. 707.

2. "But circumstances may occur in which the note or bill may be held beyond the time it becomes payable, and yet the holder not be charged in case of a loss. For the mere holding beyond the time, seems not of itself to amount to a charge against the holders, but may be explained by circumstances."

As where the defendant having a promissory note payable to him or order, two months after date, of one Smith, indorsed it to the plaintiff, who sent his servant for the money to Smith; Smith said, that the defendant had promised not to indorse it without first acquainting him; and that he was not then ready, but would pay it in a few days, and so put it off from time to time: after three weeks elapsed, the plaintiff wrote to the defendant, not having sooner learned his address (though it was proved that he had sooner enquired after it) the circumstances above. Then Smith failed: the plaintiff wrote again; and the defendant answered, that when he came to town he would put all matters to rights. Upon this evidence the jury gave a verdict for the plaintiff, though it was proved that Smith continued solvent for above three weeks, and paid upwards of 100*l.* in that time.

Anson v. Bailey.  
Mich. 1748.  
G. Hall.  
Buller N. P. 276.

"It does not appear upon what ground this verdict was given whether on the ground of due diligence having

“ having been used, or on the ground of the new promise,  
“ and it should rather seem to be the latter.”

Whitaker v.  
Morris.  
Worcest. Lent.  
Aff. 1756.  
MSS.

For where the plaintiff received a note of one *Yardley*, payable to the defendant. When it was due the plaintiff sent the note to demand the money, but not finding *Yardley*, he kept the note for seventeen or eighteen days, during which time it was proved, that he used due diligence to find him: he then wrote to his agent to inform the defendant, who returned no answer. About ten days after, the agent went to the defendant, who acknowledged the receipt of the letter; and said, the reason why he had not sent an answer was, that *Yardley* had promised to order payment in *London*, and as it was not paid, that he would certainly pay it the day after. The defendant's witnesses proved that *Yardley* was solvent when the note became due, and for some time after; but was then insolvent. *Per Wilmet*, Justice. Holding the note for so long a time was unreasonable, and would have discharged the defendant, if when he received the first notice he had disclaimed the having any thing to do with it; but by his conduct he has waived the neglect, and acquitted the plaintiff: however, he left it to the jury, who found for the defendant.

Per Cur.  
1 Term Rep.  
169.

3. “ And what shall be deemed reasonable notice of  
“ non-payment is matter of law, not of fact: and there-  
“ fore the courts controul questions on that head in going  
“ to the jury.”

Goodman v.  
Shipway.  
Mich. 11 G. 2.

Therefore where the plaintiff kept bankers bills in his possession from *April* to *August*, and the banker having failed, he brought his action against the person who had paid them to him, and had a verdict. The court granted a new trial.

Appleton v.  
Sweetapple.  
Mich. 23 G. 3.  
B. R. MSS.

So where the case was, that the plaintiff received from the defendant a banker's note, at one o'clock in the day, but did not call for payment the whole of that day, and in the evening of it the banker failed; a verdict was found for the defendant, on the ground that it was the custom of the city that bankers notes should be brought for payment the day they are received: but on a motion for a new trial, it appearing that there were many exceptions to this custom (as in the case of factors at *Bear-key*, the salesmen at *Smithfield*, and others) the court held the custom was not sufficiently proved; and even if the decision had been on that ground, it must appear that the custom was reasonable, or the court would controul it; and therefore granted a new trial.



"So in the case of promissory notes, the law is the same."

For where on the 20<sup>th</sup> of *August* the note in question was made by one *Donaldson* for 35*l.* payable six weeks after date to the defendant *Brown*, and by him indorsed to the plaintiff, on the 5<sup>th</sup> of *October* the note became due, allowing the three days of grace; on which day one *Howell*, the plaintiff's clerk, went to demand the money from *Donaldson*: not finding him at home, he left word that the note was due, and desired he would send and take it up. On the 6<sup>th</sup>, *Howell* called again upon *Donaldson*, who promised to take it up that day, within banking hours: on that day the note was not taken up; and on the 7<sup>th</sup>, *Howell* again called on *Donaldson*, and not finding him at home, he then sent it to *Brown* for payment, who refused, saying, the plaintiff had made it his own. It was proved by *Donaldson* at the trial, that on *Howell's* leaving him on the 6<sup>th</sup>, that he went to *Brown's* house, and he not being at home, left word with his wife that he could not pay it, and desired *Brown* to take it up. It was contended, that to this that *Donaldson* was to be considered as agent for the holder, and that this was notice to *Brown*. On a motion for a new trial (the jury having found for the plaintiff) it was resolved, 1. That the plaintiff by giving time so often to the maker of the note, had discharged the indorsee (the defendant): 2. That the notice here given was not regular, for it should have been given by the holder of the note, not as here by the maker.

Tindal v.

Brown.

1 Term Rep.

167.

4. "But where the holder of the bill has used due diligence on that ground he shall be discharged from any loss."

The note in this case, which was a banker's, was paid to the plaintiff after dinner, who sent it next morning at nine for payment, when the banker had stopped: it was ruled that there was no laches in the plaintiff so as to fix the loss on him; and that in all those cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.

Fletcher v.

Sandys.

2 Stra. 1242.

So where the defendants made a payment to the plaintiffs, with two bankers notes at two o'clock in the afternoon, at nine the next morning they were sent for payment, when the bankers had failed; it was adjudged that the loss should fall on the defendants, the plaintiffs having been guilty of no laches.

Moore v.

Warren.

Holme v.

Barry.

1 Stra. 415.

"In these questions the usage and custom of business is the standard to decide them, if such is reasonable."

For

Turner v.  
Mead.  
2 Stra. 416.  
Hoare v. Da  
Costa.  
2 Stra. 910.  
S. P.

For where it was proved to be the usage of the Sword-Blade Company, that when they received bankers notes to send them next morning for cash to the bankers, which cash was made up in bags, and called for by the clerk in the evening: payment was made to them by the defendant at three o'clock in the afternoon of two notes; next morning they were sent to the Bank, left there (as above) and the Bank stopped payment just before the clerk called in the evening. It was adjudged that the loss must fall on the defendant, though the money might have been received in the morning; for the company had only acted according to usage.

Welford v.  
Hankin.  
G. Hall Sitt.  
Hil. 1733.  
MSS.

So where the action was by the Commissioners of Excise against the defendant, as drawer of a bill of exchange in their favour on one *Wilson*, and specifying in the bill that it was for king's money; when the bill became due, the clerk to the commissioners carried it to *Wilson* for payment: but his clerk said he was gone out, and had left no orders about the bill, and that therefore they must take the *six days*. This was explained thus: That wherever a bill is drawn payable to the Excise, they usually allow six days beyond the three days of grace, if required, by the acceptor, on payment of one shilling to the clerk at the six days end for his trouble; that this was never refused, and was well known to be the custom; and one witness swore, that he had heard the defendant mention it, but that he had always considered it as an indulgence rather than a right: the note, including the three days of grace, was payable the 24th; no notice was given to the defendant (the drawer) till the 30th; and on the 24th *Wilson* had absconded. The defendant refused to pay, on the ground that notice was not given to him in due time. But *per Lord Mansfield*, It is not in the power of any particular officer, by particular indulgence in any case, to charge a drawer of a bill; but this is a general custom, and ingrafted on such bills, and being known universally, must bind the parties.

"But where there is no such usage to warrant it, the law is, as before laid down, that the holder should apply for payment *when the bill or note is due*; and any time given beyond it is at his own peril."

Hayward v.  
Bank of Engl.  
1 Stra. 550.

Therefore where the plaintiff who kept cash with the Bank, on *Saturday* left a note there for 50*l.* on *Cox* and *Cleeve*, on *Monday* they gave it to the runner, who left it at the shop of *Cox* and *Cleeve* in the morning, who cancelled it. When the clerk called in the afternoon, *Cox* and *Cleeve* had stopped payment: upon which he took a new note of the same tenor and date, from *Cox* and *Cleeve*.  
*King,*

*Jug. Ch. Just.* directed the jury, that it would be dangerous to suffer persons to deal with notes in this manner; and that they should find for the plaintiff; which they did accordingly.

5. "But in cases in which the loss shall fall on the holder of the note, a distinction is to be observed in the cases of notes payable to the bearer, when passed with or without indorsement."

If a note payable to bearer (supposing it has some time to run) be discounted without indorsement of the person who held it, he who so discounts it, takes it with all risques: for it is selling the bill like selling of tallies: but if the bill has been passed in payment of a debt antecedently due, or for money lent on the same bill, then is the person paying it liable to all risques. But if the person who gets the bill discounted, indorses it, then may the indorsee have a remedy on the indorsement, if he demands the money in convenient time. This was the doctrine of Lord Hale; but the jury found a verdict otherwise.

But in the case of a bill payable to order, though the party has not put his name on the back of it, yet if the money has come to his use, the person who discounted it may nevertheless recover it back in an action against him for money had and received, unless he expressly refused to indorse the bill when it was discounted.

Before we conclude this head of bills of exchange, it may be proper to consider notes or bills as joint or several.

1. If a note is joint and several, the action may be brought against both, or against either. If the plaintiff declares against both, he must declare that the defendants promised to pay jointly and severally: but if against one only, he must declare generally that the defendant promised to pay, and the note by two will be good evidence: for he that speaks in the disjunctive speaks true, if either member of the disjunctive be verified.

2. If the note had been a joint one, and the defendant had been sued as if several, the defendant could only have pleaded that matter in abatement, and not taken advantage of it in error.

5. The next class of Express Contracts upon which this action is founded which I shall consider, is that of

## POLICIES OF INSURANCE.

Under this head I shall consider, 1. What policies are good. 2. What shall avoid a policy. 3. The constructions on policies. 4. Of total, partial, and average losses. 5. Of barratry. 6. Of apportionment of the premium.

## 1. What Policies are good:

1. It is enacted by stat: 19 G. 2. c. 37: "That all insurances, interest or no interest, or without further proof of interest than the policy itself; all gaming or wagering policies, or wherein the insurer shall have no benefit of salvage, are void (except in the case of privateers, or ships in the *Spanish* or *Portugal* trade): and no re-assurance shall be lawful, except the former insurer is insolvent, a bankrupt, or dead."

The object of this statute was to confine policies of insurance to cases only where the parties insuring had a property or interest in the thing insured.

Under it, therefore, it has been decided,

1. "A *certain interest*, though not actually vested in possession, seems an interest insurable under the statute."

*Le Cras v. Hughes.*  
East. 26 Geo. 3.  
B. R.

It was therefore adjudged in this case, that though the property of all prizes and enemies goods, captured by the king's land and sea-forces, is in the king, until condemnation in the Court of Admiralty; yet that the officers and men had an insurable property in things captured, by virtue of the prize act and royal proclamation, declaring the shares and proportions to the captors.

*Grant v. Parkinson.*  
M. 22 G. 3.  
Park. Insur.  
305.

In the case of a valued policy, the insured is bound to prove some interest; but it is not necessary to go into proof of the whole value: but such policy shall not be made a cover for a wager, as to cover an insurance for 2000*l.* by proving to the value of a cable on board; and an uncertain interest as *the profits of a voyage* may be insured; and an agreement, that in case of a loss, that the profits should be valued at a certain sum, as 1000*l.* *ex. gr.* without any other voucher than the policy, shall be held good.

2. "In order to make a policy void on the ground of want of interest, the party must have parted with all  
" his

\* his interest in that which is the object of the insurance.

For in this case it was adjudged, That if the shipper of goods abroad indorses over to another the bills of lading, he thereby transfers the whole property in the goods to the indorsee, and he has no insurable interest therein: but if it appears that there was any agreement between the indorser and indorsee, that such property was not meant to be given at the time, as if it was only to secure to the indorsee the net proceeds; or that the indorser in case of a loss, was to pay the sum for which the goods were assigned, he there has an insurable interest.

3. Policies upon foreign ships are not within the statute, on account of the difficulty of bringing witnesses from abroad to prove the property. Therefore in insurances on foreign ships, the policy is proof of interest sufficient; and in the case of a judgment by default, the plaintiff need only prove the subscription to the policy by the defendant.

4. "The object of the insurance should be real property, and not be made to cover a contingent interest or advantage."

As where the plaintiff gave to the defendant 20*l.* on an agreement, that if a certain India ship reached China that season, the plaintiff was to receive nothing: but if the ship lost her passage that season, the defendant was to pay to the plaintiff 1000*l.* on the ship's arrival in the river Thames. The ship lost her passage, and the plaintiff brought his action for the money; but it appearing that he had none or little interest on board, it was held to be clearly a wagering policy, and void under the statute.

5. "The property required by the statute to be in the insured, must be such as may legally be exported and imported: for the policy shall never be allowed to cover an illegal adventure."

Therefore, where the policy was on a neutral vessel, the *Bella Juditta*, a Venetian ship, from London to the Grenades, with liberty to touch at Cork and Madeira for a lading: the ship sailed for Cork, where she took in a lading of provisions, the property of subjects of the king of France. At the time of her taking in the lading of provisions, an embargo was subsisting in the port of Cork, laid on all manner of provisions: notwithstanding which she sailed with clearances for a neutral port, but in fact for an enemy's. It was adjudged that this voyage, being in breach of the embargo,

was

Hibbert v. Carter.  
1 Term Rep. 745.

Thellusson v. Fletcher.  
Doug. 301.

Kent v. Bird.  
Cowp. 583.

Delmada v. Motteaux.  
M. 25 Geo. 3.  
Park. Insur. 266.

was a criminal act; and so being illegal, the plaintiff could not recover.

Johnston v.  
Sutton.  
Doug. 241.

So where it was made *on goods* from *London* to *New York*, which were *prohibited* to be landed there by statute, and the ship was captured: the insurer was held to be discharged as to them, though the clearances from the port of *London* were for another port (*Halifax*) to which the goods might legally have been exported."

Per Bull. Just.  
1 Term. Rep.  
339.

6. "The party making the insurance, should *insure his interest in direct terms*; that is, the interest should appear "on the face of the policy; for the court are bound to "look to the instrument, and decide upon that.

Kuler, Kemp v.  
Vigne.  
1 Term. Rep.  
304.

Therefore where the plaintiffs were *proprietors of the cargo* of the ship *Emanuel*, bound from *Falmouth* to *Marseilles*, but not of the ship itself: in a former voyage she had been captured, and brought into *Falmouth* by a privateer. In the suits in the Admiralty Court a considerable sum had been expended; which sentence having been in favour of the plaintiff, the expences were ordered by the court to be a charge on the cargo. These expences were paid, and it was the intention of the plaintiffs to have covered them by the policy in question: the policy was accordingly made on the goods, but there was on the back of the policy this memorandum: "This insurance is declared to be on money expended for reclaiming the ship and cargo, valued at the sum which shall be declared hereafter, the loss to be paid in case the ship does not arrive at *Marseilles*, and without further proof of interest than this policy, warranted free from average, and without benefit of salvage." A loss having happened, it was decided that the plaintiff having insured the event of the ship's arrival in which he had no interest, not the goods on which he had expended the money, that it was a wagering policy, and that he could not recover, though the intention might be to insure a real interest.

Carter v.  
Boehm.  
3 Burr. 1905.  
1 Black. Rep.  
593. S. C.

But in this case an insurance by the governor of *Fort Marlborough*, in the *East Indies*, was held good: for though called a *Fort*, it is not merely a place of defence, but rather a place for merchandize.

7. By stat. 14 G. 3. c. 48. "All insurances *upon lives or other events*, without interest in the parties, are declared "to be null and void."

Roebuck v.  
Hamerton,  
Cowp. 737.

Upon this statute a policy *on the sex of a person* was held to be void.

8. By

8. By c. 5. of stat. 19 G. 2. f. 37. it is declared, " That all money to be lent on bottomry or at respondentia on ships trading to *India*, shall be lent only on the ship or on the effects on board such ship, and shall be so expressed in the condition of the bond: and the benefit of salvage shall only be allowed to the lender of the money, his agents, or assigns, who alone shall have a right to insure the money so lent; and the borrower shall in case of a loss, recover no more than the surplus of his property, above the respondentia or bottomry bond: and in case it shall appear that the value of the share in the ship and effects doth not amount to the sum borrowed, the borrower shall be responsible to the lender for the deficiency, with interest for the same, and for the assurance and other charges, notwithstanding the ship be lost."

Under this clause of the statute, it has been held, that if the lender of the money on bottomry, or at respondentia, insures it, it must be specified in the policy that it is bottomry or respondentia that is so assured, or he cannot recover. *Black v. Glover.* 3 Burr. 1394.

But however, where the policy was on the goods, specie, and effects of the plaintiff, who was also captain on board the ship, and under those words he claimed money expended by him for the use of the ship in the course of the voyage, and for which he claimed respondentia interest, Lord Mansfield ruled, that under those words the plaintiff might recover, it being proved that the usage was to insure such interest by that mode. *Gregory v. Christie.* Tr. 24. S. 3. Park. Insur. 13.

9. By stat. 19 G. 2. f. 4. it is further enacted, " That it shall not be lawful to make a re-assurance, unless the insurer shall die, become a bankrupt, or be insolvent; in any of which cases the insurer should remain, his executors or administrators may re-assure to the amount that the first insurance was made; but it must be expressed in the policy to be a re-assurance."

Double insurance differs from a re-assurance, that it is made by the insured, being two policies on the same goods, &c.

In the case of a double insurance, the insured may sue on which policy he pleases, but he shall recover on one only; and on that policy on which he elects to sue, he shall recover the whole loss, and then the insurers on that policy may recover a proportionable part from the insurers whose names are on the second policy. *Godin v. London Ass. Company.* 1 Burr. 489. 1 Black. Rep. 103. S.

Andre v.  
Fletcher.  
2 T. Rep. 161.

And under this clause of the act, every re-assurance in this country, whether of foreign or *British* ships, whether by a foreigner or by a *British* subject, is void, unless the first assurer becomes a bankrupt, insolvent, or die.

10. A further regulation with regard to policies of insurance is now made by stat. 25 G. 3. c. 44. which enacts, "That no policy shall be made upon ships, goods, or merchandize, without inserting therein the Christian and surname of the person interested therein, if they reside in *England*, or the names of their respective agents, who shall effect the same: and if the policy be made for any person not residing in this kingdom, without inserting therein the name of the agents of such person to whom such goods, merchandize, &c. did belong, or the policy shall be null and void."

Pray v. Edie.  
1 T. Rep. 313.

Under the statute it has been resolved, that where the insurance is made for a person not resident in the kingdom, the name of the agent must be inserted in the policy as agent to such person, or the policy is void. For the object of the act being to ascertain who was the person for whose use the policy was made, that would not be done unless the name of the person who effected the policy was inserted as agent.

"As by the statute, property is required in the insured when the policy is made, so it seems that it must subsist in the person at the time the loss happens, or in some one possessed of the same interest."

Sadler's Com-  
pany v. Badcock.  
1 Will. 10.

For where the lessee for years insured an house for a time longer than his term: the term expired, and the house was afterward burned before the time insured for expired, after which the lessee assigned the policy to the landlord: it was adjudged, that the lessee could not assign the policy to the lessor, so as to enable him to sue on it: for the insurance is an indemnification of the person insuring, and if his interest is gone when the loss happens, the policy is void and at an end.

Molloy de Jur.  
Mar. & Nav.  
257.

12. The destination of a ship must always be expressed in the body of the policy when the insurance is made: and therefore a policy on a ship from London to leaving a blank for the place of destination, is void.

Lowry v. Bour-  
dieu.  
Debg. 451.  
Andre v.  
Fletcher.  
3 T. Rep. 266.  
S. P.

And note, That though in the case of gaming or wagering policies the insured cannot recover, yet if such a policy is underwritten by an insurer and the premium paid, *the insured cannot recover back the premium so paid*, on the ground that it was paid without consideration, because that in case of a loss,



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a loss, the insurers would not be chargeable; for *in pari delicto potior est conditio defendentis*.

### 2. What shall avoid a Policy.

This is either, 1st. By matter previous to the making of the policy; or, 2dly. By matter subsequent.

1st. *By matter previous to the making of the policy.*

As, 1st. By a false representation. 2dly. By a false warranty. 3dly. By a concealment of circumstances.

"As to the 1st. It is a general rule, that a false representation of any matter, before the policy has been signed, shall avoid it as against the insurer, on the ground of fraud."

As where the broker in procuring an insurance on a ship from *New York to Philadelphia* stated, "that she had been seen in the *Delaware* on the 11th of *December*," whereas in fact, she was lost on the 9th of *December*. It was held that this misrepresentation avoided the policy; for the representation should be true as to all the insured knows; and if he represents facts to the underwriter without knowing the truth, he takes the risk upon himself.

Mc. Dowell v. Fraser.  
Doug. 247.

But the representation must be a *positive assertion*.

For where the broker only stated, "that the ship *was expected* to sail in *November* or *December*," though in fact she had sailed before; yet was the policy held to stand good: for it was only stated as an *expectation*, and the underwriter did not inquire into the ground of expectation.

Barber v. Fletcher.  
Doug. 292.

*Note*, It was held in this case, that a representation to the first underwriter on any policy, should extend to all the others whose names are on it.

Therefore, where an underwriter put his name first on a policy as a decoy to induce others to sign, and on a promise that he should not be sued: this was held to be a fraudulent representation, and to avoid the policy. But that the insurer should return the premium.

Wilson v. Duckett.  
3 Burr. 1361.

2. "But in order to avoid a policy in consequence of misrepresentation, the representation must be *material*, and at the same time *be false*; for though the representation be not strictly true, yet if it is more *beneficial* to the underwriters, the policy shall be good."

Pawson v.  
Watson.  
Cowp. 785.

For where the instructions to insure shewn to the underwriters, stated the ship to carry "twelve guns and twenty men," and in fact she sailed with a *greater force*, the policy was held to be good, the representation being substantially performed, and in favour of the insurer.

"And the construction of the representation shall be taken according to the import of the words, as used at sea or common acceptance."

Bean v. Stupart.  
Doug. 11.

Therefore where the ship was warranted to be manned with *thirty seamen*, this was held to include the ordinary crew, as *officers, boys, &c.* who are deemed to be seamen at the *Customhouse, Greenwich Hospital*, and in the distribution of prizes.

Per Lord Mansfield.  
Cowp. 787.

2. "Such is the case of a representation as affecting the validity of a policy, but the case of a *warranty* is still stronger, as it makes part of the policy itself; it must be strictly and literally performed, and nothing tantamount will do."

As to which it has been settled,

Pawson v.  
Watson.  
Cowp. 785.  
Kenyon & Ash-  
ton v. Berthon.  
Doug. 12.  
In not.

1. That to make a warranty it must be *inserted in the policy*: if it is on a distinct piece of paper, or wafered to the policy, or made verbally, it is but a representation: but it may be inserted *in the margin* of the policy, and it then shall be deemed a warranty; so where it was wrote transversely on the margin of the policy, it was held to be a warranty.

De Hahn v.  
Hartley.  
3 Term Rep.  
343.

So in this case, which was a policy on the ship *Juno*, from *Liverpool* to *Africa*, in the margin was this memorandum, "*Sailed from Liverpool, with fourteen six-pounders, swivels, small arms, and fifty hands, or upwards*". The ship sailed from *Liverpool*, with only forty-six hands on board; but in six hours after her sailing, arrived at *Beaumaris* in *Wales*, where she took in six hands more, which continued with her during the voyage; and it was further found that the vessel, until and when she took in the six hands, was equally safe as after. It was nevertheless decided, That this was a warranty, which warranty must be strictly and literally complied with, and that therefore the policy was void.

2. "The warranty is only of the circumstances stated *at the time of underwriting the policy*, that they are then true; and if so, the insurers are liable for all future *risques*."

The insurance was made on a *Dutch* ship, from *Eden v. Parki*  
*L'Orient to Rotterdam*, warranted a neutral ship and neutral  
 property; this was the case when made, and when the  
 ship failed, viz. on the 11th of *December*, 1780; during her  
 voyage war was declared against the *Dutch*, the power to  
 whom she belonged, viz. on the 20th of *December*, whereby  
 she ceased to be neutral. She was captured on the 25th  
 of *December*, and the underwriters insisted that the war-  
 ranty was to extend to the whole of the voyage; but it was  
 held that the warranty only extended to the time when  
 the policy was made and when the risk commenced, and  
 so that the insurer was liable. *Dougl. 705.*

But where the plaintiff insured a ship and cargo war-  
 ranted to be neutral property, it was proved that the ship  
 and property was not neutral when the policy was made,  
 it was adjudged, that the insurer was discharged, though  
 the loss did not happen by capture but from having foundered:  
 for the warranty was false at the time of making the  
 policy, and so the policy void. *Woolmer v. Muilman. 3 Burr. 1419. 1 Black. Rep. 427. S. C.*

However, where the policy was on goods from the lad-  
 ing of them, lost or not lost, "*warranted well the 9th of*  
*December*, 1784;" at the trial it appeared that the policy  
 had been underwritten between one and three o'clock of  
 that day, and that the ship had been lost at eight o'clock that  
 morning. It was adjudged, That the warranty was com-  
 plied with, by the ship's being safe at any time of that day, and  
 the defendant, the insurer, therefore liable. *Blackhurst v. Cockell. 3 T. Rep. 460.*

3. "For a warranty is so absolute, that nothing but a  
 "performance of the conditions of it shall discharge it;  
 "but it shall be absolute under every circumstance as  
 "against the parties."

#### 1. As against the Insured.

For where a ship was warranted to sail from *Jamaica*,  
 on or before a particular day, and before that day was  
 prevented from sailing by an embargo, the insurer was held  
 to be discharged, though the terms of the policy could not  
 be performed. *Hore v. Whitmore. Cowp. 784.*

So if she be detained beyond the day she is warranted  
 to sail, by any cause whatever, as by dangerous weather,  
 want of repair, the enemy being off the port, or such;  
 in all these cases the insurer is discharged, by reason of the  
 non-performance of the warranty. *Bond v. Nutt. Cowp. 601. 2 Ref.*

So where the warranty was on a ship warranted to sail  
 after the 12th of *January*, 1770, and she failed before that  
 day, *Veizan v. Grant. G. Hall Sit. East. 1779. Park. Insur. 37.*

that at twelve at night he lost sight of her all at once, and that the captain of her the day before had complained that she was leaky." This letter was not communicated to the underwriter. In fact the ship continued her voyage until the 19th, when she was taken by the *Spaniards*, and there was no pretence of any knowledge of an actual loss when the insurance was made, and it was made in consequence of a letter received from the plaintiff, dated the 27th of June before. But the concealment of the letter was deemed a fraud on the insurer, and he was held to be discharged.

*Da Costa v.*  
*Scandrut.*  
2 P. Wms. 170.

For whatever accounts the insured or his agent have received of the loss or other circumstance in which the safety of the ship is concerned, these should be communicated to the underwriter, or the policy shall be void.

*Hodgson v.*  
*Richardson.*  
1 Black. Rep.  
463.

And on the same ground, a concealment of the true port of lading from whence the ship sailed, was held sufficient to avoid the policy; she having been loaded at *Leghorn* and put into *Genoa*, where she lay five months, and the policy was made after the five months expired on the ship at and from *Genoa*, and these circumstances not communicated.

*Per Lord Mansfield.*  
3 Burr. 1910.

2. " But the insured may be innocently silent as to grounds open to both to exercise their judgments on; therefore he need not mention what the insured knows already; or what he ought to know; what he takes upon himself to know, or what he waives being informed of."

*Ibid.*

As if an underwriter insures a private ship of war, he need not be told the secret enterprise it is destined for, because he knows some expedition is in view; and from the nature of the contract he waives the information.

*Carter v.*  
*Boehm.*  
3 Burr. 1905.  
1 Black. Rep.  
593. S. C.

So where the defendant underwrote a policy against the taking of *Fort Marlborough* in the *East Indies*, by the enemy for one year, on the part of the governor. In an action on the policy it was resolved, 1st. That it was no concealment of circumstances that the state of the fort and fortifications was not made known to the insurer. 1st. Because he had made no inquiry to this particular; and 2dly, That it was the risk of being attacked only that was insured; and 2dly, It was resolved, that it was not necessary to make known to the insurers the governor's opinions and surmises on the probability of an expedition against it, which were mere surmises, and equally lying within the knowledge and conjectures of the insurers themselves.

*Mayne v.*  
*Walter.*  
B. R. East.  
22 G. 3.  
*Park, Inns.* 220.

So where the policy was on a *Portuguese* ship, at and from *Madeira* to *Jamaica*, which was captured and carried into

into a *French* port, and condemned on the ground of having an *English* supercargo on board, it was insisted for the underwriter that it should have been disclosed to him that the supercargo was *English*. It was further insisted on, on the ground that an ordinance had passed in *France*, declaring ships with supercargoes of nations at enmity with *France* to be lawful prize. But per Lord *Mansfield*, If both parties are ignorant of it, the underwriter must run all risks: if the defendant knew of such an edict, it was his duty to inquire if such a supercargo was on board. It must be a fraudulent concealment of circumstances that shall vitiate a policy; so the plaintiff had judgment.

"For the underwriter is bound to know every cause which may occasion natural perils: as the difficulty of the voyage, the season, &c. as also all political dangers, as the probability of a declaration of a war or peace: and he therefore cannot screen himself under an ignorance of any of these circumstances"

As where a ship was insured before war was declared, but when it was daily expected, and she did not fail till after war had been declared; it was adjudged that there was no concealment here as to the underwriter, and that the policy remained good.

"So the insurer is bound to know the course of trade, and where a loss happens in the common course of that trade, he is liable."

As where the policy was on a ship to *Labrador* on the fishery, and the cargo until discharged. The ship arrived, but the cargo was not discharged for a considerable time, and during that time the ship was cut out of the harbour by a privateer. It was objected, that this delay and neglect in the ship's discharging her cargo should avoid the policy. But it being proved to be the usage and course of trade to discharge the cargoes of ships by degrees, and in that manner; the court held, that the underwriter was bound to know it as such, and that it must be deemed to be within the policy, and the underwriter be liable.

2dly. It was resolved, That though the question on the particular branch of trade to the place in question might be new, yet that the course and practice of the same trade to a different place, was good and admissible evidence. As the mode of trade and fishing at *Newfoundland* was admissible evidence as to the same trade to *Labrador*.

So where the insurance was upon an *India* ship, chartered in the common printed form, in which is a clause, that the

Per Lord Mansfield in S. C.

Planche v. Fletcher.  
Doug. 240.  
2 Ref.

Doug. 494.

Noble v. Kenne-  
way.  
Doug. 492.

Salvador v. Hopkins.  
3 Burr. 1707.

the Company *may detain* the ship in *India* for twelve months, otherwise she is to be allowed to return within a stated time. The ship in question was detained, and the insurance was made, without notice that she had been so detained, but made merely on the charter-party. A loss having taken place, the insurers contested the payment, on the ground that, having no notice of the detention, it was a concealment of circumstances; but it being proved that such detention was the common course of the *India* trade, was within the terms of the charter-party, and so a risk then in contemplation, and that the fact of detention might be known at the *India* House. The court on these grounds held the insurers liable.

These are the cases in which policies of insurance have been declared to be void, from matter existing before the making of them. I shall now consider,

*2dly. How Policies may be avoided by Matter subsequent.*

1st. "It is a general rule, that the terms of the policy are to be strictly adhered to; for any variation from the risk insured, discharges the underwriter."

"Upon this ground, where a certain voyage is insured, any deviation from the direct course of that voyage avoids the policy."

1. "It is not material whether the loss of the ship be the consequence of the deviation or not, nor for *what* space of time it was made, nor *how far* out of the direct course; for every the smallest deviation changes the voyage intended to be insured, and discharges the underwriter."

Fox v. Black.  
Sum. Aff.  
Exeter.  
1767. MSS.

As where the policy was on a ship bound from *Dartmouth* to *Liverpool*, she sailed from *Dartmouth*, but put into *Loo*: *Loo* was a place the must of necessity pass by in the course of her voyage, but it was not mentioned in the policy; and though it was proved that no accident whatever happened in going in or coming out of *Loo*, and that she was lost after she had cleared it, and got to sea, yet Just. *Tates* ruled this to be a deviation, and to avoid the policy.

Cock v. Town-  
son.  
Park. Ins. 341.

So where the ship *George* bound from *Cork*, in company with two other vessels, left the convoy to make a cruise during the night, being a strong ship; though this was but for

In a few hours, Lord *Camden* held, that from the moment a ship *deserted the direct voyage*, that the policy was discharged.

2. "But an intention to deviate will not avoid the policy, if a loss happens while the ship was in her direct course."

For where the ship was insured from *Carolina to Lisbon*, Foster v. Wilmer. 2 Stra. 1249. and from thence to *Bristol*, and the captain had taken in salt, which he was to deliver at *Falmouth* out of his course, before he went to *Bristol*, he was taken in the direct tract to both places, before the dividing point; the insurance was held to stand good as against the underwriters.

For where a partial loss happens in the case of an insurance, and in the same voyage a deviation is afterwards made, the insured shall recover for such loss; for the policy is only discharged *from the time of the deviation*. Green v. Young. Salk. 444. 2 Lord Raym. 840. S. C.

3. "But if in fact the ship does not proceed at all on the voyage insured, though she may be in the track of it, yet shall the policy be discharged."

The insurance in this case was on a ship from *Maryland to Cadiz*: she was taken in the *Chesapeake*; all her clearances were for *Falmouth* and a market, and the place of capture was in the course for both places, and before the dividing point. In an action against the insurers, it was held that as the evidence of her clearances shewed her destination to be different from that insured, it was not the voyage the insurer meant to underwrite; and he was therefore discharged. Wooldridge v. Boydell. Dougl. 16.

For the policy should attach when the ship sets out on her voyage, or it cannot after. So that if she fails before the time fixed in the policy, it never attaches. Way v. Modigliani. Trin. 27 G. 3. 2 Term Rcp. 30.

4. "In the case of merchant ships *with a letter of marque*." Jolly v. Walker. G. Hall East. Sitt. 1781. Park. Ins. 341. It was resolved in this case, that they might give chase to an enemy's ship, without being guilty of a deviation, but that they *could not cruise*; for such might lengthen the *risque* to an immoderate length.

5. "But a deviation is excusable in the following cases:"

1<sup>st</sup>. "In the case of necessity." As if a ship is driven out of her course by stress of weather, or if she becomes leaky, she may go out of the direct course to another port to repair.

Guibert v. Redshaw.  
GUILDH. SITT.  
HILL. 1781.  
PARK. INS. 344.  
Motteaux v. London Assur. Comp.  
1 Ath. 545.  
S. P.

As where the policy was on a ship from *Rochelle* to *Africa*; she sailed for *Africa*, and three days afterwards she met with a gale which strained her seams, and split her mizen-mast and rigging. The crew came in a body to the captain, desiring him to make some port for repair: the captain finding that she had too little ballast complied, and put into *Lisbon*. This being a deviation from necessity to repair, the insurer was held to be liable.

Lavabre v. Wilson.  
DOUGL. 271.

But in such case it must appear that such deviation was clearly through necessity. For if it was used for any trading, or such like purposes, it is not an excusable deviation. And therefore if the ship is compelled to leave her direct course by such necessity, she must proceed to such place of safety in direct course, and in the shortest possible time.

Harrington v. Halkeld.  
GUILDH. SITT.  
MICH. 1778.  
PARK. INS. 346.

Therefore where the policy was on a ship warranted to sail with convoy from *England* to *St. Kitt's*; she sailed with convoy, but was separated by a storm. It was proved by the captain, that after the separation that he did all he could to get to *St. Kitt's*, and directed his course so as to meet the convoy crossing, but that in that course she was taken by an *American* privateer, this was held to excuse the deviation, and the insured recovered.

“For to make a deviation criminal, and so discharge the underwriter, it must be done voluntarily.”

Elton v. Brogden.  
2 STRA. 1264.

For when a ship went out with a letter of marque, insured from *Bristol* to *Newfoundland*, and having taken a prize, the sailors rose and compelled the captain to leave his course for *Newfoundland* and return to *Bristol*. In an action against the insurers who set up a deviation in their defence, it was resolved, that it was excused by reason of the force used against the captain, which he could not resist, and so fell within the case of necessity, which had been always admitted as an excuse.

2dly. For the sake of *greater security*, a deviation is excusable.

Bond v. Nutt.  
COWP. 601.  
4 REL.

As where a ship deviates something from her course for the sake of *meeting with a convoy*; this shall not be deemed a deviation sufficient to discharge the insurer. But the ship should not *wait for a convoy*; for the underwriter is supposed to estimate the time his risque continues in rating the premium, and therefore it must not be prolonged, unless through necessity.

3dly. “Where the known *usage of trade* admits it.”

For



For where a ship was insured from *London to Nantz*, allowed to touch at *Ostend*, and all her clearances were to *Ostend only*, it being proved to be the usage of the trade to clear for one port and go to another, to avoid the *French* duties, and this known to be the established mode, the policy was held to be good against the underwriter.

Planche v. Fletcher.  
Dougl. 240.  
Bond v. Gon-fales.  
Salk. 445. 8. P.

2. "But though such strict adherence is required to the terms of the policy, yet some latitude is admitted as to the usage and course of trade, *so as to take in losses not within the strict letter of the policy.*"

For where the defendants had underwritten a ship to *China* in the usual form, against all losses during the voyage. When the ship reached *China* she was unrigged, and the rigging brought on shore, where by accident it was consumed by fire. The insured brought their action to be repaid their damage, and the defendants refused to pay, on the grounds that it was a loss *on land*, and so not within the policy. But it being proved that it was *the established course of the trade* so to unrig the ship, the plaintiff recovered.

Pelly v. Royal Exchange Assur. Company.  
1 Burr. 341.  
& Cal. Ibid.

So where the action was on a policy "on the goods, *specie*, and effects of the plaintiff, on board a ship from *London to Madras and China*, with liberty to touch, stay, and trade at any ports whatever." When the ship arrived at *Madras*, she was too late to go to *China* that year, upon which she was employed by the Council to go to *Bengal*, for rice; in which voyage she was lost. It was contended that this loss was not within the terms of the policy, which gave a liberty to stop, stay, and trade at places *in the course of the voyage*; but it being proved to be *the usage of the East India trade*, for ships too late for *China* to be so employed, the plaintiff recovered.

Gregory v. Christie.  
Tr. 24 G. 3.  
Park. Ins. 55.

And in a later case, where the words were the same as in the last policy, except that *to trade* wanting, the court held the same construction on the ground of usage.

Farquarson v. Hunter.  
Hill. 25 G. 3.  
Park. Ins. 56.

3. "To determine therefore what shall be an adherence to the terms of policies, that several constructions on them are to be attended to."

And, 1st. If a merchant insures a ship generally, as of such a burthen; this assurance shall take in the ship only, and not any of the merchandize on board her. But in insuring the cargo, it is not necessary to specify the particular goods; it is sufficient to say on the wares, merchandizes, &c. on board such a ship.

Molloy de Jur. Mar. & Nav. 255.

Tonge v.  
Watts. 2 Stra.  
1251.

So where the plaintiff made an insurance on a ship and freight, the ship was then careening before she took in her lading, and a tempest having arisen, she was lost: it was adjudged that the plaintiff should only recover for the loss of the ship, but not for the freight, the goods not being actually on board, so as to make the plaintiff's right to freight commence.

Montgomery v.  
Eggington.  
3 Term. Rep.  
361.

But in this case, which was an insurance on freight valued at 1500*l.*; in fact, only 500*l.* of freight was on board when the ship was driven from her moorings and lost, but goods to the whole amount of the freight were lying on the quay ready to be shipped when the accident happened; the court held the assured entitled to recover to the whole amount, notwithstanding the last case.

Molloy 255.

2. If a ship is insured *from* a port, the insurance does not commence until the voyage is begun, so that the insurer is not liable for a loss *in port*; but if she once breaks ground, though driven back into port, the insurer is liable for a loss, for the voyage was begun. But an insurance *at and from* a port, includes losses while in port.

3. "If goods are insured on board any ship, the policy shall only cover such goods as are *stowed in the usual manner in the hold*, or other place of safety, or as things of merchandize."

Ross v. Thwaite.  
Sitt. Hill. 16  
G. 3. Park.  
1*ns.* 23.

For where the policy was on the captain's goods for six months; and the loss proved, was of *goods lashed on deck, the captain's cloaths, and the ship's provisions*; it was proved in evidence, that these things were *subject to a greater risque*, and not considered as within the general term of *goods*, unless specially insured by name, and a greater premium given. Lord Mansfield ruled, that the plaintiff could not recover.

Molloy de Jur.  
Mar. & Nav.  
256.

4. If goods are insured on board any ship, and she becomes leaky, if the master and supercargo take them from that ship, and put them on board another, the policy is discharged, unless there are these words, "the goods laden to be carried by such a ship, or any other, until safely landed;" in which case the insurers are liable.

5. "When an insurance is made *for any given time*, that time must be *successive*, not at different periods."

Syers v. Bridge.  
Dougl. 509.

As in this case the insurance was on a letter of marque for six weeks, this it was held should be for six successive weeks, not part at one time and part at another.

6. The

6. The insurance is generally for such a voyage or time, *Waples v. Bames.*  
and until moored for twenty-four hours in safety. Under this clause where a vessel came in, but before the twenty-four <sup>2</sup> *Stra.* 1243.  
hours expired, was ordered out again to perform quarantine for fourteen days, during which time she was lost, it was adjudged to be within the risk insured, she not being moored twenty-four hours in safety, and the insurer liable.

Where a ship is insured from and to such a port it was held that the outward risk determined on the ship in twenty-four hours after its first arrival at the first port, but that the outward policy on goods continued till they were landed. *Barrals v. London Assurance.*  
*Sitt. Hill.* 1782.  
*Park. Ins.* 43.  
*Camden v. Cowley.*  
<sup>1</sup> *Black. Rep.* 417.

7. If a ship is insured to go with convoy, she is warranted by that policy to go to the place where the convoy is, and if in her way thither she is captured, the insurers shall be charged. *Gordon v. Morley, & Campbell v. Bourdieu.*  
<sup>2</sup> *Stra.* 1265.

So where a ship fails in pursuance of signal to join a convoy, but is prevented by bad weather from receiving her sailing orders, yet it is a sailing with convoy within the policy. *Victorin v. Cleve.*  
<sup>2</sup> *Stra.* 1250.

8. That clause in policies of insurance, "Corn, fish, salt, fruit, flour, and feed, to be free from average unless general, or the ship be stranded," means, that only in these two cases of a general average, or the stranding of the ship, the insurers shall be liable to such damages as arise from thence; but all other partial losses are excluded. *Wilson v. Smith.*  
<sup>3</sup> *Burr.* 1550.  
<sup>1</sup> *Black. Rep.* 507. *S. P.*

"And upon these it has been decided, that where any of these things specifically come to port, though damaged so as to be of little or no value, the insurer is discharged."

For where the insurance was on a cargo of peas from London to St. Augustine, and they were so damaged as to sell for less than the freight by three-fourths; it was held that by their arrival, notwithstanding the injury, that the underwriter was discharged. *Mason v. Shurray.*  
*Sitt. Hill.* 1780.  
*Park. Ins.* 131.

9. Where the policy was on a certain ship in any lawful trade, this shall be construed, "any lawful trade in which she may be employed by the owners," and if she is so employed, and the master is guilty of barratry by smuggling; yet shall the insurers be liable, if barratry was a risk insured against. *Havelock v. Hancell.*  
<sup>3</sup> *T. Rep.* 277.

#### 4. Of Total, Partial, and Average Losses; and how far the Insurer is liable for each.

Molloy de Jur.  
Mar. & Nav.  
257. 1. " After notice of loss of the ship insured, the insured  
" may abandon to the insurers and recover for a total loss,  
" and then the insurers stand in their right to recover as  
" much of the property as they can."

2 Burr. 697. " But the principle of abandonment has been restrained  
" in many instances for fear of fraud, and only is allowed  
" where the loss is of such a nature as appears to be a  
" total one: for the merchant, where there is only an ave-  
" rage loss, shall not be allowed by abandoning, to make it  
" a total one; for abandonment shall only be allowed in  
" case of a total loss.

Cazalet v.  
St. Barb.  
Pasc. 26 G. 3.  
B. R. " And so it should be made in the first instance; for if  
" the insured endeavour to recover part of the property,  
" they shall not afterward be allowed to go for a total loss."

Mitchell v.  
Eddie.  
Hil. 27 G. 3. And in these cases the insured has been allowed to  
abandon.

Goff v.  
Withers.  
2 Burr. 983. Where the ship was by bad weather obliged to *throw*  
*great part of her cargo overboard, was afterwards captured by*  
*the enemy*; and being recaptured and brought into port, her  
cargo was found of little worth, and the ship damaged. It  
was held that the insured might abandon and recover for  
a total loss.

Milles v.  
Fletcher.  
Doug. 219. So where the ship had been taken and recaptured, and  
the salvage and repairs amounted to so considerable a sum,  
that the captain deemed it for the benefit of the owner to  
sell her in a foreign port; the insured recovered for a to-  
tal loss.

Boyfield v.  
Brown.  
2 Stra. 1065. So where the cargo of the ship insured received so much  
damage, that *the value of the part saved came to less than the*  
*freight*; the insured were allowed to recover for a total  
loss.

Hamilton v.  
Mendez.  
2 Burr. 1214.  
1 Black. Rep.  
277. S. C. 2. But the mere capture of a ship, if afterwards re-  
taken without any damage, will not give the insured a  
right to abandon; but the plaintiff on such a policy can  
only recover an indemnity according to the nature of his  
case at the time of the action brought, or at most at the  
time of the offer to abandon.

Dean v.  
Dicker.  
2 Stra. 1250. In this case the ship insured was captured and carried  
into the enemy's port, where she remained eight days,  
when she was cut out by an *English* ship. The court held,  
that the ship being so long *infra presidia* and in the enemy's  
power, it was a total loss as against the insurers. But  
according

according to Lord *Mansfield's* doctrine in the case of *Goss v. Wilbers*, it seems to be undecided what capture shall be construed a total loss.

3. "The loss to charge the insurer, must happen during the existence of the policy: for though the *cause of the loss* happened during the existence of the policy, yet if the loss did not actually happen till it expired, the insurers are not liable."

For where the policy was for six months on a ship to *Mcnetone v. New York*, and during her voyage she sprung a leak, and by the opinion of the carpenter and crew, thereby received her death's wound. This was on the 1st of *January*, and on the 3d the policy expired: she was however kept above water till the 7th, when she sunk. The underwriters were held to be discharged, though she received her death's wound during the existence of the policy; the loss not having happened till after the policy had expired.

"For by no reference or retrospect shall the insurer be charged, when the risque has been run during the existence of the policy, and the voyage performed which was insured."

For where the master during the voyage insured, had been guilty of barratry, by smuggling brandy, &c. hovering near the coast; the ship arrived safe in the *Thames*, but was twenty-seven days afterwards seized, under an information for smuggling, and restored on payment of the exchequer composition of 230*l*. The insured offered to abandon, but the court held this not to be a loss within the terms of the policy; for so, after many voyages and final settlements between the parties, might a source of litigation be opened.

4. "The insurer shall be liable for no loss, unless it falls *exactly within the terms of the policy*."

Therefore, where the insurance was on the ship *Dumfriess*, at and from *London to Africa*, and during her stay and trade there, and from thence to her ports of discharge in the *West Indies*. In her voyage from *Africa* she touched at *Borbadore*, where an embargo was laid on all the ships. The captain applied for leave to depart, but was refused, in consequence of which he attempted to sail by night, but was pursued and brought back, and his crew taken from the ship, which was thereby detained four months, and the action was to recover the additional wages and the charges for provisions during the detention.

G

But

*Dunlop v. Pasch.*  
23 G. 3. B. R.  
Cii. 1 Term  
Rep. 260.

*Lockyer v. Office.*  
*Pasch.*  
26 G. 3. B. R.  
Term Rep.  
254.

*Robertson v. Ewer.*  
1 Term Rep.  
127.

But it was decided, that this being a policy on the ship, was on the *body, tackle, and furniture* of her, not on the voyage or crew, and that therefore the plaintiff could not recover.

Jones v.  
Stkmoll.  
Trin. 25 G. 3.  
Term Rep.  
130.  
Is not.

So where the policy was in the same terms as in the last case, on a cargo of slaves from *Africa* to the *West Indies*, and there was a memorandum, that the assurers were not to pay for mortality by mutiny, unless the same amounted to 10 *per cent.* on the first cost of the ship, outfit, and cargo. They did mutiny; some were shot, some died of their wounds, others in despair jumped overboard, and were drowned, and some drank salt water, of which they died after the ship came into port. It was held, that for those who were shot or perished of their wounds, as arising from mutiny, the insured should recover, but not for those who perished from collateral circumstances.

Eden v. Poole.  
Sitt. Hill. 1785.  
Park. Ins. 61.

These are the two last decided cases; but before these, it had been decided on the same principles, that in the cases of a policy on a ship, that the assured could not recover for any expences of demorage, or such like charges.

5. "Where the insured takes the goods into his own possession, the insurer then becomes discharged."

Sparrow v.  
Carruthers.  
2 Stra. 1236.

Defendant underwrote a policy on goods of the plaintiff *fill the same should be safely landed in London*; the ship arrived in port, and the plaintiff took out the goods, and put them into his own lighters, from whence they were lost: it was adjudged, that the plaintiff having taken his goods out of the possession of the captain of the ship into his own, that the insurer was discharged.

Hogg v. Gould-  
ney.  
Gd. Hall Sitt.  
Term 1745.  
Park. 133.

6. Where a partial loss is settled, it is usual for the underwriter to indorse the policy in these terms: "Adjusted this loss at *l. per cent.*" and sign it. And where such an indorsement is made; it amounts to an absolute promise to pay; and in such case, the owner need only prove such indorsement, and shall not be called upon to give any proof of the loss, or of any of the circumstances respecting it.

*Note, In settling losses this rule is observed,*

Lewis v.  
Rucker.  
2 Burr. 1167.

If the policy is a valued one, and part of the goods are damaged, the average is settled by this rule: The insurer shall pay to the insured the same proportion of the *valued* price that the loss on the goods at the port of sale bears to the price they might have been sold for, if no such loss had happened: as if the goods undamaged would sell for

20*l.* per hoghead, but in consequence of the damage produce but 15*l.* here they have suffered a loss of 5*l.* or one-fourth of their value, therefore one-fourth of the valued price must be made good by the insurer.

### 5. Of Barratry.

"Barratry is one of the risques insured against in all policies of insurance; and is a loss occasioned by any fraud of the master or mariners."

1. As where the master attempted to run the ship out of port without paying the duties, and was stoppt, whereby the ship was forfeited: this was adjudged to be barratry, and to subject the insurers, as done *per fraudem & negligentiam* of the master. Knight v. Cambridge.  
1 Stra. 581.

2. "It is essential to barratry that the wrong be committed by the master and mariners *against the owners*; and therefore if the owner is privy to, or the cause of it, the insurer is not liable, for it is not barratry."

As where the policy was on the ship *Rachette*, from London to *Rachelle*, *Le Grand* was owner of the ship, and having obtained goods from *Hague* the bankrupt (which *Hague* insured) went himself on board the vessel, and by his contrivance carried the vessel to a different port, and so defrauded *Hague*. This was held not to be barratry, *Le Grand* the owner being privy to, and concerned in, the fraud. Nutt assignee of Hague v. Bourdieu.  
1 Term Rep. 323.

But where a person acts as master of a ship, and is treated with as such, and he commits an act of barratry, it shall not be presumed that he was owner so as to discharge the underwriters: if in fact he was so, proof of that must lie upon them. Kola v. Hunter,  
4 Term Rep. 32.  
Ibid. 8. C. post. 84.

3. "So that to constitute barratry, it must be done without the knowledge of, and against the interest of, the owners."

For where the defendant underwrote a ship to *Marseilles*, and she was afterwards advertised to carry goods to *Genoa*; and the agent gave out that she should go to *Genoa* before she went to *Marseilles*, which the defendant insisted should not be done, as being contrary to the terms of the policy: however, she sailed first for *Genoa*, and in return on her course to *Marseilles*, was blown up. The plaintiffs sought to make this out to be barratry in the master: but the court held, that it was premeditated, and for the benefit of the owners, could not be construed barratry; but was a deviation which discharged the insurers. Stamms v. Brown.  
2 Stra. 1173.

Vallejo v.  
Wheeler.  
Cowp. 143.

But where the ship was chartered from *London* to *Scotille*, the master left his course and went to *Guernsey* on a smuggling business for his own benefit, *without the knowledge of the owners*: the night after she left *Guernsey* she sprung a leak, and put into *Dartmouth*: when refitted she sailed for *Helford*, where it was always intended she should take in her provisions; but in her way received such damage that she could not proceed; it was adjudged to be barratry in the master, and the insurer liable: for the loss was in fact the consequence of the deviation for a fraudulent purpose.

"Therefore a loss arising from a deviation by the captain for fraudulent purposes of his own, shall be deemed barratry."

Ross v. Hunter.  
4 Term Rep. 33.

As where the ship *Live Oak* was put up at *Jamaica* as a general ship, and freighted by the plaintiff for *New Orleans*, she sailed on her voyage, and dropped anchor at the mouth of the *Mississippi*, and the captain went up to *New Orleans* in his boat; and on his return, without pursuing his destination, stood away for the *Havannah*, and was never after heard of. It appeared that he had a private adventure of negroes on board, which not being able to dispose of at *New Orleans*, he had gone to the *Havannah* in quest of a market: it was contended for the defendant the underwriter, that this was a mere deviation, and so should discharge the underwriter: but it was resolved, that it being for a fraudulent purpose of the captain's own, that that should make it barratry.

## 6. Of Apportionment and Return of the Premium.

3 Burr. 1240.  
Cowp. 668.

"1. 'If a policy is underwritten, and the risque not run, though it has arisen from the fault of the insured, yet the insurer shall return the premium: but if the risque has once commenced, the insured shall not have a return of the premium if they do not choose to proceed on the voyage, unless the contract and voyage is of a divisible nature.'"

Stevenson v.  
Snow.  
3 Burr. 1237.

As where the ship was insured from *London* to *Halifax*, warranted with convoy from *Portsmouth*; she sailed from *London*, but when she reached *Portsmouth* the convoy had failed. It was adjudged, that the underwriter should return the premium, deducting the value of the risque from *London* to *Portsmouth*; which in this case was one-half per cent.; for the voyage was divisible in its nature, viz. from *London* to *Portsmouth*, and from thence to *Halifax*.

"But where it is not so divisible, there shall be no apportionment of the premium."



As where the insurance was on the ship *Parker Galley*, *Lilly v. Ewen*, at 5 per cent.; 2 per cent. to be returned if she failed with *Dougl. 72.* convoy: she failed with convoy only to a certain latitude. This it was held, should not make the insurer return part of the premium; for the contract was entire, and for the whole voyage.

2. "And though the contract may consist of many parts, yet it may be entire; and the premium in such case shall not be apportioned."

As where a ship was insured "at and from *Honfleur* to *Bermon v. Angola*, during her stay there, and thence to *Domingo*, *Woodbridge.* "and home;" premium 11%. It was held, that though *Dougl. 751.* there were several parts of this voyage, yet that the contract was entire; and if the risque was once begun, that there should be no apportionment of the premium.

So when the insurance was on a ship "at and from *Tyrie v. London* to any port for 12 months." This was held to be *Fletcher.* one entire contract, and that the premium should not be *Cowp. 666.* considered as so much a month: so that the ship being taken before the twelve months expired, that there should be no apportionment of the premium.

These are the principal cases of express contracts which are objects of this action. I shall subjoin a few other cases, reducible to no general head.

1. A parson may recover against the former incumbent *Jones v. Hill* who has been guilty of dilapidations, the sum expended by *3 Lev. 268.* him in necessary repairs, by action of *assumpsit*.

So an action lies by a *prebendary* against his predecessor *Radcliffe v.* or his executor, for dilapidations suffered in the prebendal *Doyley.* house in the predecessor's time; but where by the constitution of the church of *Ely*, the receiver was to require the *2 Term Rep. 630.* prebendaries to repair their houses; and if they neglected, to repair them and deduct the expence from their salaries; *but the church was to find the materials* in all cases. It was resolved, that in such an action for dilapidation, the successor could only recover the expence of the workmen in making the repairs, not the amount of the materials, which the church was to find.

2. Where a rector or incumbent of a parish gives a title *Martyn v.* to a parson to be ordained to the bishop, appointing him *Hynd.* under the title, he undertakes to continue him *Dougl. 137.* and pay him a salary until he shall be otherwise provided *Same parties,* for by ecclesiastical preferment, or be lawfully removed. *Cowp. 437.* And it was further resolved, That under such title, 1. The office is not removable without just cause. 2. That while the

the rector continues in the parish, he is bound to pay the salary he engages for the curate; who can recover it in this action: but in case the rector is preferred to another parish the obligation ceases, and the salary is not recoverable. 3. The election of the curate to a *reader* is not such a preferment as shall exempt the rector from the obligation he undertakes in the title.

Williams v.  
Crey.  
Salk. 12.

3. If the sheriff levies money on a *fi. fa.* and does not pay it over to the plaintiff, he may recover it in this action, as levied to his use.

Longchamp v.  
Kenny.  
Douglass 132.

4. This action will lie to recover the value of a masquerade, or such like ticket, at the suit of the person who passed it. *Note*, The objection to this action was that it should be *trover*.

Menetone v.  
Athawes.  
3 Burr. 1592.

5. So where a shipwright had repaired a ship, which by accident was burnt while in dock, yet was he allowed to recover in this action the amount of the repairs.

Atkyns v. Hill.  
Cowp. 284.  
Hawkes v.  
Saunders.  
Ibid. S. P.

6. This action lies against an executor or administrator having sufficient assets, to recover a *legacy*.

South Sea Com-  
pany v. Dun-  
comb.  
2 Stra. 919.

7. *Assumpsit* will lie for money had and received, though the lender of the money has taken a pledge for his security: for he shall be presumed to trust to the personal security of the borrower as well as the pledge, unless there appears a special agreement to discharge the person.

Having thus considered what will maintain this action, I shall now proceed to consider,

## 2. WHAT CONTRACTS WILL NOT SUPPORT AN ASSUMPSIT.

1. "This action being founded either on an express contract or an implied undertaking, whenever the presumption of such contract or undertaking is excluded, as where it appears that money for which the action was brought was paid, *without the consent* of the person sued, there this action will not lie."

Stokes v.  
Lewis.  
2 Term Rep. 20.

As in this case, where it appeared to be the custom of the parishes of *St. Vedast* and *St. Michael le Quern* to elect a sexton jointly, and each parish to pay a moiety of the salary. *St. Michael's* had claimed a right to have a separate sexton, and gave notice to that effect to the parish of *St. Vedast*. *St. Vedast's* paid to the sexton last chosen and then in possession, the whole salary; and then brought an action against *St. Michael's* for the moiety: it was ad-  
judged

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judged that it could not be maintained, for the money was paid clearly *against the consent* of the parish of *St. Michael*; and so there could be no undertaking implied.

So when in *assumpsit* for goods sold, the evidence was, that the plaintiff's servant had sold the goods to the defendant, who was to give him half price, *which the servant was to keep to his own use*, it was adjudged that the plaintiff could not maintain this action, as there was clearly no contract or undertaking to the plaintiff himself. Thorp v. Howe.  
Per Holt.  
Salk. MSS.  
Buller N. P.  
130.

2. "A mere voluntary courtesy will not support an *assumpsit*." Hob. 106.

"And that shall be deemed a voluntary courtesy *which has been undertaken without a prospect of certain recompense*."

As where the plaintiff had done much business for Mr. Guy (who bequeathed all his possessions to the hospital) and *had done it in contemplation of a legacy from him*. But being disappointed, after Guy's death, he brought this action on a *quantum meruit* for his former service done for Mr. Guy, when it was adjudged, that it would not lie, the business having been done not with a view to immediate or certain recompense, but with a view to a legacy. Osborn v.  
Governors of  
Guy's Hospital.  
2 Sra. 728.

So where in an action on an apothecary's bill for medicines and attendance on the testator. It appeared that the plaintiff had never made any regular entries in his books, but had attended the testator in expectation of a legacy, he being related to him; and that he had declared, that had the testator left him any thing, that he would never have made a charge. The plaintiff was nonsuited on the above principle. Hiccox v. Proud.  
Staff. Lent Ass.  
1762. cor. Wil-  
met. MSS.

"But if there was any request made by the defendant, there the courtesy or benefit shall be presumed and construed to be *not voluntary*, but done in pursuance of the request; and this action will then lie."

As where the plaintiff declared that the defendant, having killed a man, requested the plaintiff to labour to procure him a pardon, for which he promised him 100*l*. which the plaintiff having performed, it was adjudged that the action well lay, the service on which the action was founded having arisen from the request of the defendant himself. Lampleigh v.  
Braithwaite,  
Hob. 105.

So where the defendant's testator made a promise to the plaintiff that if she would use her influence with her daughter, and induce her to marry him, that he would Grieffy v.  
Lowther.  
Hob. 10

give her 100*l*. She did so, and the marriage took effect : it was adjudged a sufficient consideration to uphold the action.

“ But though a request has been made, yet if it was in consequence of the offer, advice, or inducement of the other party, it will not support this action.”

Aldworth's  
case.  
Reading Aff.  
1749.  
Buller N. P.  
353.

As where in *assumpsit* for money had and received, the defendant gave in evidence that he had paid 20*l*. to the secretary of a foreign ambassador for a protection for the plaintiff, and also charged his costs and expences in procuring it. The judge directed the jury, that in case they believed that the plaintiff himself had applied to the defendant to get this protection, to allow the sum paid for it ; but that in case they believed that the advice to get such protection came from the defendant, then to allow him nothing : and the jury, who knew the defendant to be an artful designing fellow, and the plaintiff an ignorant young man, who had been drawn into difficulties by the defendant, who acted for him as his attorney, found for the plaintiff, without any allowance.

“ And it should seem, that *any thing done in the course of a person's business or employment* shall not be deemed a voluntary courtesy, but the foundation of a contract.”

Jermyn v.  
Lucas,  
Per Twissden  
Norfolk, 1662.  
Trials p. pais  
181.

For where in *indebitatus assumpsit* for carrying herrings, the plaintiff gave in evidence that he was a porter at *Yarmouth*, and that when the herring-ships came in, he went of his own head and carried such a quantity to the defendant's house. It was held to be good evidence in support of the action.

3. “ This action will not lie where the consideration on which it is founded arises from an illegal act.”

Allen v. Rascoas  
Lev. 174.

As where the plaintiff gave to the defendant twenty shillings ; in consideration of which he undertook to beat J. S. out of such a close, or to pay forty shillings. He did not do it : whereupon the plaintiff brought *assumpsit* for the forty shillings ; and the action was adjudged not to lie, the consideration being an unlawful act.

Webb v. Bishop.  
Gloucester Aff.  
1731.  
Buller N. P.  
16.

So where two boxed for a wager of five guineas, on *assumpsit* for that sum brought by the winner, the action was held not to lie, the act being an unlawful one, as being a breach of the peace.

Thwaite v.  
Wether.  
Lord. Sitt.  
Trin. 1773.  
MSB.

So where the plaintiff and defendant had agreed to buy stock and tickets for time and on speculation, which they accordingly did by a broker, and being losers, the plaintiff

## ASSUMPSIT.

did paid all the money and then brought his action against the defendant for the moiety. It was held clearly that the action would not lie, for the transaction was illegal, as contrary to the stockjobbing acts, and both plaintiff and defendant parties to it, and this action was founded on it; and to allow the party to maintain an action founded on a contract forbidden by the statute, would be to disobey the statute. *Idier*, If a third person who is not a party to the illegal transaction, lends money to be so applied, he may nevertheless recover it (*post Fairney v. Reynolds*, Ch. Debt.)

So where the case was, That *Keeble* the plaintiffs testator, the defendant, and a third had been engaged together as partners in certain stockjobbing transactions from which they having incurred considerable losses, they came to a settlement with *Portis* their broker, who had paid all the differences. At that time *Keeble* paid to *Portis* the whole sum he had advanced, except 811*l.* for which he drew a bill on the defendant, payable to *Portis*, which the defendant accepted. The bill not being paid when *Keeble* died, *Portis* brought an action against the plaintiff his executor, and recovered the amount of the bill; to recover which from the defendant the present action was brought. The defence set up was, That this was a payment of money arising under a contract on a stockjobbing transaction, which was contrary to law, and so could not be recovered: but the court were of opinion, that the plaintiff was entitled to recover according to the following distinction: "That, as between the parties themselves to the illegal transaction, where one party paid money for the other, in pursuance of the illegal contract, *without his directions*, that the money so advanced could not be recovered, for as the party himself was not compellable by law to pay, he should not be obliged to do that circumstantially which he could not be compelled to do directly; but, that if one party *by the other's direction, and with his assent*, pays money which has become due on an illegal transaction, that such money is recoverable by the party who has paid it, as paid by the other's order and direction." That therefore, in this case, the defendant having accepted the bill, and thereby shewn his knowledge of and assent to the transaction, that he was bound to repay the plaintiffs who had paid it for him: so the plaintiffs judgment.

Petrie Exec. of  
*Keeble v. Han-*  
nay.  
3 Term Rep.  
418.

"So though the consideration be *but in part unlawful*,  
yet it shall vitiate the action, which is founded on the  
whole consideration taken together."

For

Fetherstone v.  
Hutchinson.  
Cro. Elis. 199.

For where in consideration that the plaintiff (who was a special bailiff) would let a person whom he had arrested for debt, go at large; and of two shillings by him then paid to the defendant, the defendant undertook to pay the whole debt, on *assumpsit* brought for the money, it was adjudged not to lie; for the promise being to the same effect as an obligation, which would be void by stat. 23 H. 6. the promise should be so too: and though it was coupled with another consideration of two shillings, yet it being void as to part, it was void as to the whole, the *assumpsit* being founded on the two considerations taken together.

“On this ground, money won at gaming would not be recoverable.” But there is this exception:

Barjeau v.  
Walmley.  
2 Sca. 1249.

That where the money was lent to play with, but there was no security as by bond or note, but merely *parol*, this was held not a case within the statute; for there not being the word *contract* in the statute, which only declares all securities void, the parliament might think there could be no great harm in a *parol* contract where the credit was not likely to run high, and that therefore the lender might recover.

Robinson v.  
Bland.  
3 Burr. 1078.

So where the plaintiff declared on a bill of exchange for 672*l.* drawn at *Paris*, by Sir J. Bland, on himself in *England*, in favour of the plaintiff, it appeared that the bill of exchange was given for 372*l.* won at play, and 300*l.* lent at the time and place of play; the play was fair, and there was no imputation on the plaintiff; it was adjudged, that the stat. 9 Ann. 14. having declared all securities given for money won at play to be void, that this bill of exchange was void, for being an entire security and bad in part, it is bad in the whole; but the contract was divisible, and that part of it which had arisen on a good consideration, that is the money fairly lent, might be recovered.

“And though the plaintiff in this action has not been a party to the illegal transaction, yet where the *assumpsit* has arisen from it, he cannot recover.”

Stackpole v.  
Earle.  
2 Will. 133.

For where the defendant promised the plaintiff two per cent. on the sum a purchaser to be procured by the plaintiff would give for the defendant's place of surveyor of baggage in the port of *London*. The plaintiff did procure him a purchaser, who gave him 1200*l.* and then he brought his action for 24*l.* being two per cent. on 1200*l.* When it was adjudged that the sale of offices being prohibited by stat. 5 & 6 Ed. 6. c. 16. that the sale was an illegal transaction,

action, and that the *assumpsit* founded on it was void; and so the defendant had judgment.

"But where the *transaction* is not in itself unlawful, no subsequent illegal use of the subject of it shall destroy the *assumpsit*."

As where the plaintiffs, who were merchants living at *Dunkirk*, sold tea to the defendant there, and which they delivered at *Dunkirk*, though this tea was for the purpose of being smuggled into *England*, and that known to the plaintiffs at the time, yet they not being concerned in the smuggling, and it being a fair sale as to them, and good by the laws of the country where they lived, they were allowed to recover the price of the tea in *England*. Holtman v. Johnson. Cowp. 341.

But where in this case the plaintiffs were four partners, three of whom lived in *England*, and the fourth in *Guernsey*, and this last sold goods (brandy) at *Guernsey*, put up in a particular manner for the purpose of smuggling, though the partners in *England* knew nothing of the transaction. In an action brought for the price of the brandy, the plaintiffs were non-suited. For in this case, the parties were natives of *England*, and the contract was made in contravention of the laws of *England*, and so being in its foundation illegal, could not be supported; and the court took the distinction between this case and the last; the transaction there was not unlawful, the sale was abroad by persons not subject to the laws of *England*, and was good when made, the subjects of a foreign country not being bound to take notice of the revenue laws of this: but here the contract was unlawful, and therefore no action could be maintained on it. Biggs v. Lawrence. 3 Term Rep. 454.

So where the plaintiff, an inhabitant of *Guernsey*, sold goods to the defendant in *Guernsey*, which it appeared were to have been smuggled into *England*, and the defendant gave the bills in question, on which the action was brought for the price: it was decided, that the plaintiff could not recover, for they were given for an illegal contract, and to a subject of this country, who therefore could not maintain an action on them. Clugas v. Penaluna. 4 Term Rep. 466.

"However, where a person has been ignorantly induced by the false representations of another to do an illegal act, from which a damage arises to him, he shall recover those damages from the person who induced him to act in such manner, on his promise of indemnifying him; for the act to be done must appear to be unlawful at the time, or the promise will not be void." Ball. N. P. 146.

For

Fletcher v. Har-  
cott. Hutt. 55.  
Winch. 48.

For where the defendant, pretending that he had arrested a person on a commission of rebellion, brought him to the plaintiff's house, and promised to save him harmless on consideration of his keeping such person for one night safe as a prisoner; this person recovered damages against the plaintiff for false imprisonment, and the plaintiff recovered to the amount of them on his promise against the defendant; for the fact might be true, and when the plaintiff so received the person, he did not know that he was doing an unlawful act.

Martyn v.  
Blythman.  
Yelv. 107.

But where a person, in consideration that a gaoler would let his prisoner go at large, promised to pay the debt, and save him harmless, this promise was held to be void, for the act must have been known to be unlawful at the time.

"But though the consideration is a *matter not expressly contrary to law*, yet if it be *contrary to the policy of the law*, to support, this action cannot be maintained."

Neret v. Wallace  
Affiance of  
Collins.  
3 Term Rep. 17.

For where the plaintiffs declared, that on the last examination of the bankrupt Collins, he being charged by the plaintiffs with having received several sums of money, which he had not accounted for; when the commissioners were about to examine him as to the disclosure of these matters, in consideration that the plaintiffs would forbear from proceeding in such examination, the defendant undertook to pay all such monies as the bankrupt had received, and not accounted for. In an action on these promises, the plaintiffs had judgment in C. P. and now error was brought, when the judgment was reversed, *as being against the policy of the bankrupt laws*; for the creditors had a right to have the bankrupt examined, both as he might disclose effects which they did not know of, and as he forfeited his right to his certificate if he had lost money by gaming, or had given 100*l.* as a portion with a child in marriage; and promises of this nature went to stifle such enquiries, and impose on the Great Seal in granting his certificate.

4. "*Assumpsit* will not lie to recover money promised for doing that which it was the parties duty to do without reward; for it is extortion and illegal."

Stocelbury v.  
Smith.  
2 Burr. 924.  
2 Black. Rep.  
204. S. C.

As where the plaintiff, who was a special bailiff, declared, that having arrested one Stanton, in consideration that he would take the defendant and another as bail for Stanton, the defendant promised to pay him six guineas and a half, for which this action was brought; it was held not to lie, it being the duty of the bailiff to take proper bail without any recompense or reward whatever.



So where an executor sued out an *elegit*, and a stranger in consideration that the sheriff would forthwith execute it, and of sixpence paid to him by the sheriff, promised to pay him 60*l.* upon which the sheriff executed the writ, and brought his action for the money: it was adjudged that no action lay, as being a consideration against law; for the sheriff is bound to do his duty without reward, and this 60*l.* is no discharge of fees due to the sheriff, being given by a stranger, and not expressed to be in consideration of them. — *Bridge v. Cage*. Cro. Jac. 103.

5. "Wherever the consideration of the *assumpsit* arises from a *fraudulent transaction*, this action will not lie."

For where the plaintiffs were sutlers to four regiments of camp, and were to keep eight horses for each regiment, for the forage of which government gave them an allowance of hay and oats, which was to be furnished by the defendant, who was the contractor, and bound by his contract not to commute the allowance of forage for money. In fact the plaintiffs kept but fourteen horses for the whole, and entered into an agreement, that they should not take the whole of the allowance, but that the defendant should retain part, and give a certain allowance of nine-pence halfpenny per ration to the plaintiffs for every ration left; this was held to be void, and the money not recoverable; for it was a cheat and fraud on government, who paid for the whole. *Willis v. Bald*. Douglt. 453.

"And in order to disable a party from maintaining this action, it is *not necessary* that the cause of action should be for money or property of which others had been defrauded, as in the last case; but if in the transaction on which the action is founded there has been fraud or deceit practised on third persons, the action will not lie."

For where the defendant being about to succeed the plaintiff in a house, which the plaintiff had before occupied, and wishing to have the furniture, the plaintiff agreed to let it, if she could get a friend to advance the money, as she had not the money herself. She accordingly applied to a friend of the name of *Welch*, and he treated with the plaintiff for the goods, who agreed to take 70*l.* for them, which was paid, and *Welch* took a bill of sale of them to himself; but there was a private agreement between the plaintiff and the defendant, that she was to give 30*l.* more for them, and she accordingly gave two promissory notes for 15*l.* each, on one of which the present action was brought; it was resolved, that the plaintiff could not recover, for the whole transaction was a fraud on *Welch*, who *Jackson v. Duchaire*. 3 Term Rep. 551. Vide *Cockshot v. Bennet*, ante, & *Jackson v. Lomas*. Post. S. P.

who was induced to advance his money, in order to serve the defendant; which, had he known of this, he would probably not have done, as by this means his end might be defeated.

6. "So this action being an equitable one, cannot be supported where the *assumpsit* arises from an *unconscientious demand*."

Jeffons v.  
Brooke.  
Cowp. 793.

As where the plaintiff lent to the defendant a sum of money for the purpose of making a purchase of goods upon the defendant's note payable on demand, and the plaintiff was to have half the profits on the re-sale of the things purchased, over and above the note of hand; the purchase was made, and within two hours after, plaintiff made a demand of payment of the note; which being paid, he brought his action for half the profits on the sale of the goods. It was adjudged, that as the note bore interest from the demand, to have interest from that time, and half the profits too, seemed to be usurious; the demand having been made immediately; but if not usurious, that it was *unconscientious*; for the agreement was for half the profits in lieu of interest; and the defendant had judgment.

Plumbe v.  
Carter.  
Guildh. Sitt.  
Trin. 1775.  
MSS. & Cowp.  
116.

So where it was proved to be the usage and custom of the trade of gold-refiners, that in case goods purchased were not paid for within three months, that the buyer was to pay an halfpenny an ounce per month till the money was paid, this on calculation exceeded the rate of 5 per cent. but was adjudged not to be usury in a case decided prior to this, it not being a loan of money, and being sanctioned by the usage of the trade (*Floyer v. Edwards, Cowp. 112. & post.*) Carter the defendant in this case having exceeded the credit, an action was brought against him, to recover the surplus arising from this allowance of an halfpenny per ounce above principal and interest, the defendant having paid the amount of these into court. Lord Mansfield was clearly of opinion, that though this transaction was not usury, yet, that it was in fact taking advantage of a person's necessities, and demanding from him beyond legal interest; that it was therefore unconscientious, and not to be recovered.

7. "And so likewise if the consideration is a *frivolous* or *groundless one*, or if there is *no consideration at all*, this action will not lie, for *ex nudo pacto non oritur actio*."

2 Roll. Ab. 23.

As if *A.* promises to *B.* a sum of money on consideration that *B.* would make him an estate at will, it is a void promise to support this action, for *B.* may instantly determine his will.

So

So where the plaintiff declared, That whereas the defendant's father had taken the profits of certain lands to which the plaintiff had title, and for which he had filed his bill in Chancery against the defendant, and that in consideration that the plaintiff would withdraw his bill, the defendant undertook to repay the profits so taken, and for which he now brought his action: it was resolved, that it could not be maintained, *for there was no consideration*, as the bill in Chancery might have been an unjust one, upon which the plaintiff could have recovered nothing; and beside that, the son was not to answer for the father's wrong.

Tooley v. Windham. Cro. Eliz. 206.

"Upon this ground, a promise of any thing for a *service already performed*, without view to reward, is void. "Though where the service had been done *at the request of* another, it shall be good to support this action."

Beauchamp v. Neggin. Cro. Eliz. 282.

But a promise to a *servant* in consideration of past services has been held to be good.

Franklin v. Braddell. Hutt. 84.

And for the same reason, promises to pay merely in consideration of *unspecified forbearance* are void, and will not uphold this action. For the forbearance might be but for an hour, which would be a forbearance, and yet would be an inadequate and frivolous consideration.

Lutwich v. Hufsey. Cro. Eliz. 19.

Therefore where the consideration is forbearance, the time of forbearance should be a convenient one, and set forth to be left to the jury, who are to judge whether the forbearance was a sufficient consideration to support the action.

Treford v. Holmes. Hutt. 108.

"But where a party is under a moral obligation to do any thing, a promise made of payment, or a reward for doing it, shall not be deemed *nudum pactum*, though no other immediate consideration appears."

Ball. N. P. 147.

For where in *assumpsit* for nursing a bastard child, it appeared that the child had originally been put out to nurse with the plaintiff, by the mother's uncle, with whom it continued until the mother's death; that then the father (the defendant) being applied to, promised to pay, on which the action was brought; it was objected that this was *nudum pactum*, the child not having been taken on his credit. But per Lord Mansfield, the defendant was under an obligation to provide for the child; his bare approbation should be construed into a promise, and be sufficient to bind him: so the plaintiff had a verdict.

Scott v. Nelson. Sitt. West. Hall. 4 Geo. 3. MSS.

Watson v.  
Turner.  
Bull. N. P. 147.

So where a pauper being taken ill, an apothecary attended her, without any previous order by the overseers; but they afterwards promised to pay, this was adjudged not to be a *nudum pactum*, for the overseers are bound to provide for the poor.

Woodford v.  
Deacon.  
Cro. Jac. 206.  
Cro. Jac. 213.  
S. P.

8. *Assumpsit* will not lie where the debt for which the action is brought is *due by specialty*; for the specialty ought to be declared on: therefore it is necessary always in the declaration to set out *for what cause the debt became due (post)* or it will be a sufficient reason to arrest the judgment.

Bulstrode v.  
Gilborne.  
2 Stra. 1027.

Therefore where *by deed under hand and seal*, the plaintiff had appointed the defendant his deputy, as prothonotary to the palace court, and the defendant entered into *articles to account*: the plaintiff brought *assumpsit* for the sums received by the defendant in the office, and the action was held not to lie; for the defendant being bound by deed, the plaintiff had a remedy against him of an higher nature; as here an action of covenant.

"However, though the cause of action may have arisen under a deed, yet, if party's remedy is not by means of the deed, this action will lie."

Decker, & Uz.  
v. Pope.  
Coram Mans-  
field.  
Sitt. Trin. 1757.  
MSS.

As where the surety paid the debt, for which he had joined another in a bond, it was adjudged that he could maintain *assumpsit* for it against the principal, it being money paid to his use.

Toussaint v.  
Martinnant.  
2 Term Rep.  
100.

But where the plaintiff joined the defendant as surety for payment of several sums of money, *but took a bond from him for the amount of the sums he was so engaged for*, and which sums he was afterward obliged to pay, and then brought *assumpsit* for them; the action was adjudged not to lie; for *having taken a bond*, he had relied on that as his surety, and not on the promise the law would otherwise raise in his favour.

"In the last case, the plaintiff not having relied on the promise raised by implication of law, could not recover; but where there is an *express promise*, it has been held otherwise."

Moravian v. Levi.  
Sitt. M. 1786.  
2 Term Rep.  
483.

For where in case upon promises the plaintiff and defendant had entered into articles of partnership, which contained a covenant to account at certain times, and this demand arose on the balance struck, which it was proved the defendant expressly promised to pay; it was objected that the action should be covenant; but it was ruled by Buller, Justice, that the action well lay, as founded on the express promise.

And

And *a fortiori* where a like balance was struck on the dissolution of a partnership, and an account stated, containing that balance, and *also other articles* not connected with it, and which account so stated the defendant promised to pay; it was held clearly by the court, that this action lay for it.

Foster v. Al-  
lanfon.  
2 Term Rep.  
477.

So where there is an *express promise to account*, this action will lie; but the plaintiff shall not in that action be allowed to *go into the particulars of the account*, but shall confine himself merely to the damage he has sustained from not *accounting according to promise*.

Wilkin v. Wil-  
kin.  
Salk. 9.

And therefore in *assumpsit* grounded on a promise to account, misapplication or breach of trust must always be laid in the declaration; for if a man receives money to a special purpose, it is not to be demanded as a duty until he has refused to apply it according to his trust.

Poulter v. Cor-  
wall.  
Salk. 9.

However, where a person gave a respondentia bond for a sum of money, and bound himself by an indorsement on the bond, that in case the obligee chose to assign the bond to any person, that he would pay the assignee the whole sum without any deduction. This was adjudged to be an undertaking to any assignee to pay the money, and that *indubitatus assumpsit* would therefore lie for the money by the person to whom the bond was assigned, *as founded on the undertaking and not on the bond*.

Fenner v.  
Meares.  
2 Black. Rep.  
1269.

9. "*Assumpsit* will not lie where the agreement in which it is founded has been obtained by coercion, or is a fraud on others."

For where in *assumpsit* upon promises; the case was, that the defendant having become insolvent, had by deed of trust, dated the 26th of April, 1787, assigned all his effects to trustees for the benefit of his creditors, who were to sign it by a given time; the plaintiffs refused to sign the deed, unless their whole debt was secured to them, upon which an agreement was entered into by the plaintiffs and the defendant, that the plaintiffs should sign the deed, and receive the dividends under it, and that for payment of the debt, the defendant undertook to recommend cotton to the plaintiffs for sale, the profits of which should in three years discharge the remainder of the debt; and in case of ~~loss~~ deficiency, that the defendant should make it good. It then appeared that a loss had in fact happened on the sale of the cottons; for which, and the original debt, this ~~action~~ was brought; it was resolved, that the action would ~~not~~ lie; for it was intended by the creditors who had signed the deed, that on the defendant's assigning over all his property

Jackson v.  
Lomas.  
4 Term Rep.  
166.  
Cockshot v.  
Bennett, ante 5.  
S. P.

party to his creditors that he should become a free man ; but the plaintiffs having executed the deed on a private agreement, securing to themselves a further advantage, it was a coercion on the defendant himself, and a fraud on the other creditors, and so could not be supported.

10. " These are cases in which, on account of the consideration on which the action is founded being bad, the plaintiff cannot recover ; but in those cases, *if the party has paid the money on such consideration, he shall not be allowed to recover it back.*"

Browning v.  
Morris.  
Cowp. 790.

As where a lottery-office keeper paid money on an insurance policy, which insurance was against act of parliament. Having brought his action to recover it back, it was resolved, that the insurance being illegal, the court would not assist him in the recovery of what he had voluntarily paid, and the defendant had judgment.

Per Lord Mansfield.  
2 Burr. 1112.

So if a person pays a debt which has been barred by the statute of limitations, or contracted during his infancy and not for necessities, or to the extent of principal and interest on an usurious contract, or money fairly lost at play. In none of these cases can the party recover it back ; for it was paid through a motive of honour and honesty, and the defendant might therefore retain it with a safe conscience, and therefore the law will not compel him to refund it.

" But where the money has been paid on an illegal consideration, that is to induce an illegal act, if the service is not performed, the plaintiff shall recover back the money."

Quot. Anon.  
1 Ld. Raymond,  
89.

As where a man gave money to a custom-house officer to run goods, the goods were seized, and the person recovered back his money again.

11. " Though the person who has received any money from another, may not be legally intitled to keep it, yet *if it depends on a question of right, which cannot be fairly and completely tried in this form of action*, but may in another ; *assumpsit cannot be maintained for it.*"

Landon v.  
Hooper.  
Cowp. 414.

As where the defendant had taken and impounded the plaintiff's cattle as damage feasant, the plaintiff claimed a right of common, but paid the money charged for the damage, and then brought *assumpsit* for money had and received, to recover it back, for the purpose of trying the right ; the action was adjudged not to lie ; 1st. Because that upon the general issue of *non assumpsit* the defendant would not be apprized of the point to which to apply his defence ; and,  
2dly.

2dly. That the right would not be decided, for it would not appear afterward on the face of the record. The action should have been *trespass or replevin*, in which the right would come in question, and appear on the face of the record.

So where *assumpsit* for money had and received, was brought to recover back twenty guineas, given as the difference in the exchange of two horses of the plaintiff's and of the defendant's; the defendant had warranted his to be found, but it afterwards appeared to be unsound: on discovering the unsoundness, the plaintiff sent back the defendant's horse, and demanded the twenty guineas; but the defendant said he had sold him, and refused to take him, on which this action was brought, and was held not to lie, for the warranty was the point to be tried, which it could not be in the action in this form. That is an action for money had and received; but the plaintiff might declare in *assumpsit* on the express warranty. Tower v. Wells  
Cowp. 819.  
Stuart v. Wilkin  
Doug. 18.

So it will not lie as for money had and received, to recover stock in any of the public funds; for stock is not money, and the remedy should be by bill in Chancery. This case was to recover back 500*l.* India stock transferred to the defendant by the bankrupt after an act of bankruptcy committed. Nightingale  
assignee of Met-  
vior v. Devisme.  
5 Burr. 2509.  
a Black. Rep.  
684. S. C.

So where the plaintiff who was servant to the defendant, had found some bank notes, as he said, in the defendant's cellar, he shewed them to the defendants, who said they were not their property; but refusing to deliver them up, the plaintiff brought *assumpsit for money had and received* against the defendant; and Lord Mansfield held, that the action would not lie, it should have been *trover* for the notes. Noyes v. Price.  
Sitt. Hill. 1776,  
MSS.

12. These are the most material grounds of this action. It is however to be observed, that as this action is founded upon promises, it is enacted by the *statute of frauds*, 29 Car. 2. c. 3. that no action can be maintained on a bare promise without a note in writing to prove it, in the following cases:

1. " No executor shall be charged in any deficiency or damage out of his own estate: 2. No person shall be charged to answer for the debt or default of another person: 3. Nor any one be charged on any agreement in consideration of marriage: 4. Nor upon any agreement for the sale of lands, tenements, or hereditaments: 5. Nor upon any agreement whatever which is not to be carried into execution within a year from the making thereof.

" thereof, unless there be a memorandum of the contract, agreement, or undertaking, signed by the parties or their agents properly authorised."

Upon these clauses in the statute, these decisions following have taken place.

As to the first, I find no determination.

*Bourkemaire v. Darnell.*  
1 Salk. 27.  
Buller N. P. 480.

As to the 2d, the rule is, 1. " That if the defendant comes only in aid of another who obtains the goods, so that there is a remedy against both, according to their distinct engagements, that that is a collateral undertaking, and void without a note in writing; but where the whole credit is given to the defendant, so that the other is but as his servant, and there is no remedy against him, that is not a collateral but an *original undertaking*; in which case a note in writing is not necessary.

*Williams v. Leper.*  
3 Burr. 1826.

As where the plaintiff was lessor to one *Taylor*, who owed him 45*l.* for rent, *Taylor* assigned over all his effects for the benefit of his other creditors, who appointed the defendant as their broker, to sell the effects. He advertised a sale, and on the morning of it the plaintiff came to make a distress; whereupon the defendant promised that if he would desist from distraining, that he would pay him the whole of the rent. For this rent the action was brought, and the defendant relied on the statute of frauds as an undertaking for the debt of another, and no memorandum in writing. But it was adjudged that the plaintiff having a prior lien on the goods in the hands of the defendant, that they were the fund charged, and to pay out of this fund was an original undertaking by the defendant himself.

2. " But wherever the person undertaking is *jointly interested* with others, though they receive the benefit of his undertaking, no note in writing is there necessary; for the undertaking should be *solely* for the debt of another, which here is not the case."

*Stephens v. Squire.*  
5 Mod. 213.  
Comb. 362.

As where an action was brought against the *defendant and two others*, for appearing for the plaintiff without a warrant, and the defendant promised that if the plaintiff would not prosecute his action, that he would pay him 10*l.* and costs. A note in writing in this case was held not to be necessary, *is not being a promise solely for the debt of another*, the defendant being himself originally liable (3 Burr. 1888.); but per *Holt*, If *A.* says, do not proceed against *B.* for a debt, and I will give you 10*l.* this would be within the statute.

3. " So



3. "So it should seem that a debt should be absolutely due to, or a demand exist by the person to whom the undertaking is made, to make a note in writing necessary. For if the third person for whose benefit the undertaking was given was never himself liable, the undertaking shall be deemed an original one, and no note in writing be necessary."

Therefore where, in consideration that the plaintiff would not sue *A. B.* for a debt which he owed him, the defendant promised to pay the money due, viz. 4*l.* in a week. This was adjudged to be clearly within the statute, and void without a note in writing; for it was for the debt of another, and still subsisting, notwithstanding the defendant's promise, and so was collateral. *Rothery v. Currie*, Trin. 21 G. 2. C. B. Buller N. P. 282.

But in this case, where the plaintiff's testator had brought an action against one *Johnson* for an assault, in consideration that he would withdraw the record, and not proceed to trial, the defendant *Nash* promised to pay him 5*l.* On action brought for this 5*l.* the defendant pleaded the statute of frauds; but it was adjudged not to be within it; for *Johnson* was not a debtor, the cause was not tried, there might have been a verdict for him, so that never being liable to any certain debt, this was an original undertaking by the defendant, and not for the debt of another. *Read v. Nash*, 1 Will. 305.

This is confirmed by this case; for here an action being brought by the plaintiff against one *Vickers* for a certain sum of money, the defendant in consideration that the plaintiff would stay his action, undertook to pay the money; it was held clearly that there should have been a note in writing; for the undertaking was for a subsisting debt of another. *Fish v. Hutchinson*, 2 Will. 94.

4. "So wherever a person is bound by law to do any act for another, or to procure it to be done, if it is done, though without the request of such person, a subsequent promise by him to pay is good without a note in writing."

As where a pauper was taken ill, and an apothecary sent for without the knowledge of the overseers of the poor, who attended and cured her, and after the cure the overseers promised to pay him by parol. It was adjudged sufficient to charge them; for the overseers are bound to provide for the care of the poor, and so shall be deemed originally liable. *Watson v. Turner & al.*, Trin. 7 Geo. 3. in Exchequer, Bull. N. P. 281.

5. However, it seems to be difficult to draw any general rule to decide in what cases an undertaker for the debt of another

another shall be charged, and in what not; and it must therefore be left to the jury to decide to whom the original credit was given, for on that point all the cases turn.

But thus far it has been decided :

“ That if the person for whose use goods are furnished is liable at all, in such case a note in writing is necessary to charge the party who gives the undertaking to pay.”

Mutton v. Whar-  
ram.  
2 Term. Rep.  
80.

For where the defendant applied to the plaintiff to serve *Agre Coulthard*, of *Pomfret*, with groceries; the plaintiff said he did not know *Coulthard*, nor any person in that part of the world; upon which the defendant replied, “ you know me, and I'll see you paid;” the plaintiff said then he would serve him, and the defendant repeated the same words. *Coulthard* ordered goods which were sent, he was made debtor in the plaintiff's books, and they applied to him for payment; which not being paid, this action was brought against the defendant on his undertaking. The defendant relied on the statute of frauds; for the plaintiff the distinction in *Jones v. Cooper*, *Cowp.* 227. was relied on, viz. That where the promise to pay for goods delivered to a third person, was made before the delivery, that it should be deemed an original undertaking, and a note in writing not necessary; but the court over-ruled that distinction, and held, that if the party receiving the goods was at all liable, that a note in writing was necessary.

3d. The third case under the statute requiring a note in writing is “ *On agreements in consideration of marriage.*”

As to which it has been settled,

Cock v. Baker.  
1 Stra. 34.

1. “ That promises to marry, are not within the statute. “ For the statute relates only to promises or contracts in consideration of marriage, as to pay money, make a settlement, &c.”

Bird v. Blosse.  
2 Vent. 361.

As where a father wrote a letter, signifying his consent that his daughter should marry *T. B.* and that he would give her 1500*l.* On a further treaty he receded from this proposal; but sometime afterward he declared that he would agree to what he had promised in his first letter. It was adjudged that this last declaration had set up the first letter, and was a good promise in writing under the statute.

So where the defendant, before the marriage with the plaintiff, promised her that she should enjoy all her own estates to her separate use, and writings were ordered to be drawn accordingly. After marriage the defendant promised by letter as before. But upon a bill filed against him to compel a performance, he pleaded the statute of frauds, and it was held to be a good bar, as this was clearly an agreement in consideration of marriage, and there was no note in writing before the marriage.

Lady Montacute  
v. Sir J. Maxwell her husband  
1 P. Wms. 618.

2. "As to what shall be a *sufficient signing* within the statute, it was decided in this case."

That where on a treaty of marriage between the plaintiff and his wife before their marriage; the defendant, who was mother of the plaintiff's wife, promised to give her 1000*l.* and accordingly articles were drawn, to which the plaintiff, his wife, and a trustee were parties, for the purpose of settling the 1000*l.* on the marriage: they were read over in the presence of the mother, and executed in her presence, and *she signed her name as a witness*. This was adjudged to be a sufficient signing of a note in writing within the statute.

Welford v.  
Beesley.  
in Canc.  
1 Will. 118.

4. The fourth case under the statute requiring a note in writing is, "*on agreements for the sale of lands or any interest in them.*"

"This clause is confined to the sale of things real, as the lands themselves, and so does not extend to the sale of timber growing on the land, which is a mere chattel, and so may be sold by parol."

Per Treby Anon.  
1 Ld. Raymond,  
182.

Cases under this head fall more properly to the jurisdiction of the Court of Chancery, as they occur on the ground of a bill being filed to compel a sale and complete a purchase.

1. In that court it has been held, That a letter from the seller of an estate mentioning his intention to sell the estate, but *not the terms*, is not such a note in writing as is required by the statute.

Clerk v. Wright  
1 Atk. 12.

2. Plaintiff agreed to sell to the defendant an house for 600*l.* and by consent an attorney drew a draft of a conveyance, which was sent to defendant to peruse; he made several alterations in it, and returned it to the plaintiff to get it engrossed, and a time was appointed for executing it. Afterwards refusing to perfect the conveyance and pay the money, the plaintiff filed his bill. When it was resolved that

Hawkins v.  
Holmes.  
1 P. Wms.;

that this was not such a signing or memorandum in writing as was good under the statute.

§. C.

3. But if the party on the faith of such a sale enters into possession, and lays out money in improvements, a court of equity will order a specific performance.

5. The fifth case in which a note in writing is required, is on *agreements not to be performed within a year*.

§ Burr. 1281.

As to this the rule is, "That where the agreement depends upon a contingency, and it does not appear but the contingency will happen within the year; nor does it appear from the agreement that it is to be performed after the year; there a note in writing is *not necessary*, because the contingency may happen within the year, and so the agreement be performed within that time: but where it appears from the whole tenor of the agreement, that it is to be *performed after the year*; there an agreement in writing is required under the statute."

Fenton v. Emb-  
lers.

3 Burr. 1278.  
1 Black. Rep.  
353. S. C.

As where by parol the defendant's testator promised the plaintiff, that if she would come to live with him as house-keeper, that he would give her 8l. *per annum*, and *leave her by his will an annuity of 16l. a year*. She went and lived with him till his death; when he having failed to make for her the provision promised, she brought her action against the executor; when it was ruled, on the defendant's pleading the statute, that as this depended on a contingency (as the testator might have died within the year) no note in writing was required, and the plaintiff recovered the value of the annuity.

Anon.  
Comb. 463.

So where the promise was to pay one hundred pounds on the *defendant's marriage*, a note in writing was held not to be necessary.

Anon.  
Saik. 289.

So where it was to pay *on the return of a ship*: for both these contingencies might happen within the year.

I shall now, in pursuance of my original division, proceed to the consideration,

II. OF ASSUMPSIT WITH REFERENCE TO THE PERSON.

This is in the case,

- 1st. Of Persons in general.
- 2d. Of Factors.
- 3d. Of Agents or Receivers.
- 4th. Of Masters and Owners of Ships.
- 5th. Of Servants.
- 6th. Of Partners.
- 7th. Of Bankrupts.
- 8th. Of Executors.
- 9th. Of Husband and Wife.
- 10th. Officers of the Revenue.

1st. OF PERSONS IN GENERAL.

1. "It is a general rule, that no person can maintain this action on an agreement to which he is not a party; for in such case there can be no contract express or implied." Jordan v. Jordan.  
Cro. Eliz. 369.

Therefore where one *Hardy* being indebted to the plaintiff, the defendant undertook to pay *Hardy's* debt to the plaintiff, provided *Hardy* would assign to the defendant an interest which he had in a certain house, and the plaintiff avers that *Hardy* was ready to assign, whereby the defendant became liable to pay the debt so due by *Hardy*. It was resolved that the plaintiff could not maintain this action against the defendant, he being a stranger to the consideration; as the agreement was between *Hardy* and the defendant, and no contract subsisted between the defendant and him. Crow v. Rogers.  
1 Stra. 592.

So where one *Parris* was indebted both to the plaintiff and the defendant, and a stranger was indebted to *Parris*; the defendant undertook to pay *Parris's* debt to the plaintiff on condition that *Parris* would suffer him to sue the stranger: he did so sue the stranger, and recovered; and then the plaintiff sued him and had judgment, which was arrested; Bourne v. Mason.  
1 Vent. 6.

arrested: for the plaintiff was a stranger to the consideration.

“ However, where the consideration is a *provision for, or to enure to the advantage of a child*, this rule has admitted of exceptions.”

Dutton v. Poole.  
2 Vent. 318.  
332.  
Sir T. Jones  
203.  
Rookwood's  
case. Cro. Eliz.  
764. S. P.

For where the defendant's father, who was also father to the plaintiff's wife, was about to cut down 1000*l.* worth of timber off an estate which was to descend to the defendant, as a portion for the daughter: the defendant then promised his father that *he* would pay 1000*l.* to his sister, provided the father would not sell the timber. In an action brought by the daughter's husband for this sum after the father's death, the plaintiff had a verdict. It was moved in arrest of judgment, that the action could only have been brought by the father, or his executors, as party to the agreement, and not by the daughter, who was a stranger to it: but it was adjudged, that *it* being a provision for and a kind of debt to the daughter, that *she* should maintain this action though a mere stranger could not.

And a still stronger case was cited in the case from *Vent. 6.* above: Where a physician was promised a sum of money for himself, and another for his daughter, provided he performed a certain cure: it was held, that the nearness of relation gave the daughter the benefit of the consideration performed by her father: and that *she* might maintain *assumpsit* for the money.

“ And upon this ground it should seem, that in *assumpsit* upon promises, general declarations are not sufficient; they should be made *to the person who brings the action.*”

2 Roll. Abv 6.

For where upon a discourse between the father of *A.* and *B.* in relation to a marriage between *A.* and the daughter of *B.* *B.* said, that he would give one hundred pounds to *whoever would marry his daughter with his consent.* *A.* did marry her with his consent, and brought his action for the money: when it was adjudged, that it would not lie on those general declarations, as they amounted not to a promise to the plaintiff himself; though this would now be clearly bad on the statute of frauds.

2d. In the case of

## FACTORS.

1. If a factor sell the goods of a person beyond sea, he may maintain an action in his own name for the price; for the promise shall be presumed to be made to him: and so if he buys goods, the seller may have an action against him, for the credit shall be presumed to be given to him: and particularly because it is for the benefit of trade.

Gonzalez v. Sladen.

Trin. 1 Ann.

Salk. MSS.

Bull. N. P. 130.

This seems clearly to be the case where there is no interposition of the owner of the goods sold, as to whom, it seems, "That the factor's sale creates a contract between the buyer and the owner of the goods; and therefore if the factor sells for payment at a future day, if the owner gives notice to the buyer to pay him, and not the factor, the buyer is not justified in paying the factor." This was the doctrine delivered by the Chief Justice in the case of *Alderton* and *Schrimshire* following: but the jury found against his direction: their verdict was to the following effect:

Bull. N. P. 130.

2 Stra. 1182.

That where, by the usage of trade, the factor sells the goods at his own risk; that is, at all events answerable to the owner; in such case the owner cannot arrest the money due on the sale of his goods in the hands of the buyer: for the factor, not the buyer, is debtor to the owner of the goods.

Alderton v.

Schrimshire.

2 Stra. 1182.

But that case seems now not to be law: for in this case the doctrine before laid down by the Chief Justice in *Alderton v. Schrimshire*, was recognized and admitted. The case was this: In the month of June 1783, a cargo of wheat was consigned to the plaintiffs from *Ostend*, and they employed one *Farrer* as their factor to sell it. It was proved, that the factors in this trade have a *del credere* commission beside factorage, and never, except in case of the failure of the factor, make the purchaser's names known to the owners. On the 9th of June, *Farrer* sold two hundred quarters of this wheat to the defendant. On the 16th of June, *Farrer* handed over to the plaintiffs the wheat then remaining in his hands, and the names of those who had purchased the rest; and among others that of the defendant *Milward*. On the 20th of the same month, *Farrer* stopt payment, and compounded with his creditors, who executed to him a deed to that purpose. On the 21st of June, the plaintiffs delivered to the defendant a bill of parcels of the wheat sold by *Farrer*, and demanded payment by his acceptance of a bill to the amount

Escot v. Milward.

Sittings after

Mich. 24 Geo.

3.

at

at a month's date. The defendant refused, and insisted that he had a right to set it off against a debt due by *Farrer* to him. The plaintiffs brought his action; and the doctrine of the Chief Justice in *Scrimshire v. Alderton*, was laid down to the jury by Just. *Buller* as the clear law on the subject; and the jury found accordingly for the plaintiffs.

"But the doctrine of this case only applies *where no thing is due to the factor himself*: for he has a lien upon the money in the hands of the buyer for any monies due, or for any engagement he enters into on account of the principal: for he may bring an action for the price against the buyer; and it would be no defence for him to say, that the principal (the owner of the goods) was indebted to him (the buyer) to the amount of them: for the factor has a prior right."

*Drinkwater v.*  
*Goodwin.*  
*Cowp. 251.*

This was the law as held by Lord *Mansfield* in the following case: In *assumpsit* for goods sold and delivered, by the plaintiffs as assignees of one *Dowding*, a bankrupt. It appeared that *Dowding* was a clothier, and employed one *Jefferies* as his factor, who sold to the defendant *Goodwin* the cloths in question marked *J. Dowding*, before the act of bankruptcy. *Goodwin* knew *Jefferies* to have sold the goods as factor, and he had notice from the assignees not to pay *Jefferies*: notwithstanding which he did pay him, and this action was now brought to make him pay the value again to the assignees. It appeared in evidence, that *Dowding* wanting money to buy cloths, that *Jefferies* had joined him in bonds for the purpose of raising it, on the security of the cloth being sent to him. It was adjudged by the court that *Jefferies* had a lien upon the cloth and the money in the hands of the buyer, on account of the money so raised (*Jefferies* having paid the amount of the bonds); and that therefore the plaintiffs could not recover.

*Anon.*  
*Cal. K. B. 514.*  
*Per Holk, Ch.*  
*Just.*

2. Every factor ought to sell for ready money, unless the usage of trade is otherwise; and if he sell upon trust, without usage to warrant him, he alone is chargeable in case of a loss: but if the usage be to give credit, then in case he sells to a person in good credit, if such person fails, the factor is discharged: but it is otherwise, though the usage to sell is so, if he sells to a person notoriously discredited at the time of the sale: for then in case of a loss he is liable; and so he should sell in market overt, or there is no change of property.

*Zinck v.*  
*Waller.*  
*2 Black. Rep.*  
*1154.*

3. As a factor has a lien upon goods consigned to him for his own demands; and as also, if goods consigned to him as factor remain in specie, they are not subject to his bankruptcy:



bankruptcy: so where bills have been remitted to a factor for a special purpose, if not disposed of or paid away at the time of his bankruptcy, they shall still be considered as belonging to the principal, and be recovered in this action; but subject however to any lien the factor himself may have on them.

2. The next is the case of

AGENTS OR RECEIVERS.

1. An action for money had and received will not lie against a known agent, or receiver, for money paid voluntarily to such agent for the use of the principal, unless he had paid it over after notice not to do it: for it would be unjust to suffer such an action to proceed, and to leave him to be defended or deserted as the principal thought fit; and especially if the action is brought for the purpose of trying any right of the principal.

Sadler v. Evans.  
4 Burr. 1985.

For where a man receives money for another as his agent, under a pretence of right (*ex gr.* for tithe) the court will not suffer the principal's right to be tried in an action against the agent, if the defendant can shew the least colour of right in his principal: as in this case, by having been some time in possession.

Staplefield v.  
Yewd.  
Trin. 27 G. 2.  
Per Lee, Ch. Jus.  
Buller N.P. 133.

2. So where money has been paid to an agent or receiver by mistake, he shall not be liable to refund it if he has paid it over to his principal; for he should not suffer for another's mistake, but the payer should resort to the principal himself: but if he has not paid it over to his principal, but has it in his hands, or only given credit for it to his principal in his books, or on an account between them; in these cases, he shall be personally liable, though not paid over: but if any new credit had been given to the principal by the agent on receiving the money, it would be proper evidence to leave to the jury, Whether the agent might not, or had not received any prejudice thereby? and so vary the case.

Buller v. Harrison.  
Cowp. 566.

3. "But as to how far the principal shall be bound by the act of his agent, a distinction is to be observed between a general and a particular agent."

A general agent shall bind his principal by all his acts, even though he exceeds his authority; as if a stable-keeper having an horse to sell, directs his servant not to warrant him, notwithstanding which he does, the master will nevertheless be liable on the warranty, because the servant was acting within the scope of his authority; and the public

Per cur. 3 Term  
Rep. 763.

public cannot be supposed to be cognizant of any private conversation between the master and the servant: but where a person is made a *particular agent*, and under a circumscribed authority, there he can only bind his principal *as far as he acts within his authority*, for that would be to enable one man to bind another against his will.

### 3. The next is the case of

#### MASTERS AND OWNERS OF SHIPS.

These are liable to this action. 1. For general charges against the ship. 2. For repairs. 3. For seamen's wages.

#### 1. *As to general Charges against the Ship.*

1. "The master of a ship may bind his owners to any contract which is for the benefit of the ship."

Yates v. Hall.  
1 Term Rep.  
73-

As where the ship was captured and ransomed, and the master prevailed on one of the seamen to become an hostage, and promised him the wages he then had (4*l.* a month) for the time he should remain with the enemy till the ransom was paid, to which the plaintiff agreed, and in consequence remained a prisoner from *May 1780 to August 1783*. The owners disputed the payment of the ransom-bill, as being more than the value of the ship and cargo, which occasioned a suit in the admiralty: in consequence of which the ransom-bill was set aside, and the net proceeds of the ship and cargo paid to the captors. It was contended for the defendant, that the captain had exceeded his authority, and had no right to bind the owners beyond the value of the ship: but this being done for the supposed benefit of the ship, by a person having power to bind them, was adjudged to charge the owners: and the sailor recovered for the whole time he was in the custody of the enemy.

2. It is enacted by stat. 7 G. 2. 15. "That no persons who are or shall be owners of ships shall be liable for any loss or damage, by reason of any embezzlement of, secreting or making away with (by the master or mariners) any gold, silver, jewels, or merchandize or other goods which shall be shipped, taken in, or put on board any vessel *beyond the value of the ship and freight*."

Sutton v.  
Mitchell.  
1 Term Rep. 18.

Under this statute it was decided, That where a large quantity of dollars had been shipped on board the ship *Elbe*, from London to *Hamburg*; and while the ship lay at anchor in the *Thames* she was boarded by a number of fresh-water pirates, who robbed her of the dollars; that, as the object

object of the statute was to protect the owners from all weather of the master and mariners, and at the same time to subject them as far as *they* trusted the master and mariners; that it was necessary to prove the collusion or assistance of either the master or mariners; therefore, in this case, it being proved, That one of the sailors had given information to the robbers when the dollars were brought aboard, and got share of them, that that satisfied the statute: and the plaintiff had judgment only to the amount of the ship and freight.

3. "And for such general charges against the ship, the owners are specifically liable."

For where the defendant was sole owner of a ship, *which* Parish v. Craw-  
*he let to Fletcher for a voyage at a certain sum, and Fletcher was to ford.*  
*have the benefit of carrying the goods.* The plaintiff had shipped 2 Stra. 1251.  
a quantity of moidores, and the bills of lading were signed by the captain; the moidores being lost, an action was brought against the defendant as owner to charge him under the stat. 7 G. 2. to the amount of the ship and freight. For the defendant it was insisted, That *Fletcher* was owner to this purpose, and that he should be sued: but it appearing that the defendant had covenanted for the condition of the ship and behaviour of the master, it was ruled, that he was liable, for *Fletcher* had only the use, but *he* had the ownership, and that the freight he had from *Fletcher* was sufficient to charge him.

## 2. As to Repairs done to the Ship.

1. If they are done *at home*, there is no lien on the ship Watkinson v. Barnardiston.  
itself, but the owners must be personally sued: but if the repairs are done *abroad*, by the maritime law the master 2 P. Wms. 367.  
may hypothecate the ship's bottom.

2. The person who repairs a ship has his election either Garnham v. Bennett.  
to sue the master who employs him, or the owners; but 2 Stra. 816.  
if he undertakes it on a special promise from either, the other is discharged.

"But where no such agreement appears, both are subject: and no private agreement between the master and owners shall deprive a person who has a charge against the ship for repairs, from suing either party."

For where the owners of a ship *leased her for years to the* Rich v. Coe.  
*master, under covenants, giving him the sole disposal of* Cowp. 636.  
*her, for his own sole benefit, he undertaking to keep her in*  
*repair during the term; the owners were notwithstanding*  
*held to be liable for repairs done to the ship during the term,*  
and

and necessaries furnished to her, by order of the master, though they were unknown at the time to the plaintiff who furnished them; but if the plaintiff had had notice of the contract between the master and owners, it might be a ground to absolve the owners.

Cowp. 639.

"The owners therefore are generally liable, but the master only on *his contract*, and no further."

Farmers v.

Davis.

1 Term Rep.  
108.

He therefore is not liable to be sued for necessaries furnished to the ship *before the time he became master* of her; for there there is no contract.

"So in order to subject a person as owner, he must be *absolute owner, and in possession*."

Jackson v.

Vernon.

H. Black.

Rep. 114.

For where the plaintiff was a ropemaker, and supplied the ship *Three Sisters*, with cordage and stores on the 7th of Feb. 1787, and 22d July and 1st of August, 1788, by the order of one Palmer, the owner, without knowledge of the defendant. On the 6th of Feb. 1787, Palmer gave a bond to the defendant for 3000l.; and on the same day executed a deed, assigning the ship to the defendant absolutely, with a power of selling her at any time for payment of the money lent, but with a covenant to reconvey on payment of the money lent, but that not to interfere with the power of sale before given. On the 7th of August the defendant took possession: on the 22d, he sold her with an indemnity to the purchaser, against all demands up to that time; and this action was for the goods furnished at the times above mentioned, by order of Palmer, when it was resolved, That this was a conveyance in the nature of a mortgage; that Palmer was the owner until the defendant took possession; and that the defendant was therefore not liable until he took possession: and the defendant therefore had judgment.

3. "And so much is the interest of the master considered only as that of a servant, and the whole property "in the owners."

Stevenson v.

Mortimer.

Cowp. 805.

That where a customhouse officer had exacted exorbitant fees from the master of a vessel; an action for money had and received was adjudged to lie against the officer at the suit of the owners.

4. "The owners may maintain *assumpsit* for the freight, "but a mortgage of the ship cannot until he has taken possession under the mortgage."

Chinnery v.

Blackburn.

East. 24. G. 3.

cit. H. Black.

Rep. 117.

For where the owner had mortgaged the ship in January, 1783, to the plaintiff, but the owner having victualled and manned the ship on a voyage to the West Indies and home, at his own risk and expence, had contracted

igned her to the house of *Dunlop*, in *London*, with orders to tell her. She discharged all her cargo on the 27th of September; and on the 29th, the plaintiff took possession of her under his mortgage deed, and brought the present action for freight due by the defendant on her voyage from the *West Indies*; when it was resolved, That the defendant's contract being with the mortgagor, the mortgagee never having taken possession till after all the cargo was discharged, nor executed any act of ownership whatever, could not maintain this action.

### 3. In the Case of Seamens Wages.

1. "Freight is the mother of wages; therefore in case  
"a loss happens to the ship, no wages are recoverable;  
"that is, the whole voyage must be performed, or the  
"sailors shall not be intitled to any wages, for the ship is  
"only entitled to freight on delivery of the cargo."

Therefore where the plaintiff was engaged as a sailor on a voyage from *Barnstaple* to *Newfoundland*, and from thence to *Portugal* or *Spain*, taking in a cargo of fish at *Newfoundland*, and the ship was taken soon after she had sailed from *Newfoundland*; it was contended, that there were two distinct voyages, one to *Newfoundland*, the other from that to *Spain*; and that therefore the sailors were entitled to wages for the voyage to *Newfoundland*. But it was resolved, that the voyage was entire; *Newfoundland* being the place of lading, and *Spain* of delivery of the cargo, when only the ship is entitled to freight, and therefore in this case that no wages were due, the ship being taken before she had reached the discharging port.

*Hernaman v. Bawden.*  
3 Burr. 1844.

*Vid. L. Raym.*  
397, 632.

"And on this ground, where no freight is earning by  
"the ship, the mariners have no title to wages."

Therefore while a ship is lading or unlading, the sailors are not entitled to wages, unless there is a special agreement to that effect, to allow wages during that time; in which case it shall be good.

*Campion v. Nicholas.*  
1 Stra. 405.

2. "And the case is the same of *Letters of Marque* or *Privateers*, for the voyage or cruize must be performed, or no wages are due to the mariners: neither shall it give the officer or mariners any claim, that they were absent from the ship by the owners direction when she was lost; for they must still be considered as belonging to the ship."

Therefore where the plaintiff had engaged on board a *Letter of Marque* on a cruize, at the rate of 5*l.* per month, and a share of the prize-money; they took a prize, and the plaintiff was put on board her as prize-master, and got

*Abernethy v. Landale.*  
Doug. 520.

safe to *England*, but the ship was afterwards taken on her cruize: it was contended for the plaintiff, that he had not deserted the ship, *but had been employed by the owners*, that he was therefore entitled to wages, as being employed in their service till the ship returned to *England*: but it was adjudged, that though he was entitled to a share of the prize-money, yet that he had no claim to wages, on account of the capture of the ship.

Hall v. Eden.  
E. 25 G. 3. f.  
B. R. MSS.

But where the plaintiff was a sailor, and had engaged to serve on board a privateer by articles, in writing, under which he was to have no wages, but a share in the prize-money; and it was further agreed, "That all persons serving on board the privateer were to continue on board six months (the time of being in harbour not to be included) upon pain of forfeiture of all share of the prize-money. *Before the six months expired the plaintiff was pressed*, and put on board a King's ship; and *during the time he was on board, a prize was taken by the privateer*. It was adjudged, that the plaintiff having been *disabled by inevitable necessity, and employed in a meritorious service*, that he should not forfeit his claim to his share of the prize-money.

5. The next case of contracts I shall consider, are those made by

## SERVANTS.

F. N. B.  
Ward v.  
Evans.  
Salk. 443.

1. A man shall be bound by the contracts made by his servant, *as far as he gives him authority to buy and sell for him*; but his act shall not bind the master, unless he acts within his authority.

2. "Where credit is given to a servant on account of his *master or employer*, he is not personally liable."

Pochin v. Paw-  
ley.  
1 Black. Rep.  
670.

Therefore where the action was *assumpsit against the surveyor of a turnpike road*, by a farmer employed by order of the commissioners to repair the road: it was ruled, That the contract was made, not with the surveyor personally, but with the commissioners; and that the surveyor was but as their servant, and therefore was not personally liable.

Macbeath v.  
Haldimand.  
1 Term Rep.  
182.

So where the defendant was governor of *Quebec*, and in *that capacity* contracted for stores upon government account, which were furnished by the plaintiff: it was adjudged, that the *credit being given to government only through the defendant*, as a servant to government, that he was not personally liable to an action for their amount.

So where the defendant was commander of a King's ship, and by deed covenanted with the defendant, on account of the King to pay the plaintiff a certain sum for freight: it was adjudged, That the deed having been entered into by him as a servant of government, and on their account, could not bind him personally.

Unwin v.  
Wolfeley.  
1 Term Rep.  
674.

3. If a master once sends his servant to get goods for him on trust, for which the master afterwards pays; if the servant afterwards fraudulently takes up goods from the same person, which he converts to his own use, the master is liable: for, by paying the first debt, he gave the servant a credit, and ought to be charged.

Hazard v.  
Treadwell.  
1 Stra. 506.

"But if the master never had any previous dealing with a tradesman, but the tradesman's dealings have all been with the servant, whom the master has regularly paid; in that case the master shall not be charged."

As here, where the action was for oats and hay furnished to the defendant's horses; but the plaintiff had had no dealings with the master, but with the coachman, to whom the master gave money for the purpose monthly: the plaintiff never applied to the defendant (the master) during the time, and the demand was of a year's standing: it was ruled, that the master was not liable to the demand.

Kendal v.  
Andrews.  
Sitt. East. Term.  
28 Geo. 3. B.R.  
Fry v. Robinson.  
Sitt. Trin.  
31 Geo. 3.  
Per Ld. Kenyon.  
S. P.

6. The next case I shall consider, is that of

#### PARTNERS.

1. "To make a person liable as a partner, there must be an agreement between him and the ostensible person to share in all *risques* of profit or loss, or he must have permitted the other to use his credit, and to hold him out as jointly liable with himself."

Therefore where in an action for money lent, the case was, That the defendants had employed one Contencin, who was a tea broker, and as such was employed by several persons to purchase a lot of tea at the India sales, of which each had separate shares, the lot being too large for one dealer. At the time of the sale the company give a warrant to deliver the tea, and payment is made to the company on these warrants, at three different payments; these warrants are often pledged, and money raised on them, generally much less than the value of the lot for which the warrant is given. In the present case, the plaintiffs were bankers, and had advanced money to Contencin on his note, and on the tea-warrant, under which the defendants were joint purchasers. By the fall of tea, the value of the warrant became of

Hoare v. Dawes.  
Doug. 356.

less value than the money advanced, and *Contencin* having become a bankrupt, the plaintiff brought this action against the defendants, in order to charge them as dormant partners; but it was resolved, That in this case there was no partnership, no agreement among the parties to advance money for each other as to share in profit or loss; it was merely an undertaking to the broker by each purchaser for a particular quantity: so the defendant had judgment:

“ And it seems to be necessary, in order to charge a  
 “ person as partner on the ground of sharing in profit and  
 “ loss, to shew they were concerned not only in the joint  
 “ purchase, but in the *joint sale*; that is, that their interest  
 “ should continue joint till the time of the sale, when the  
 “ profit and loss would be ascertained.”

Coope & alt. v.  
 Eyre & alt:  
 H. Black. Rep.  
 37.

For where the plaintiffs were proprietors of a *Greenland* ship, and sold a quantity of oil to the defendants, but *Eyre* only was the ostensible buyer, and *the others were to share his purchase at the same rate he paid for it.* They had purchased quantities of oil from other persons, on which occasion the defendants had come forward and declared, that they had a joint concern with *Eyre*, but there were no declarations of that sort made to the plaintiffs: it was proved that the defendants were to have different shares of the purchase; but there was no proof of any future joint concern in the sale. It was resolved, That there was no evidence to make them partners, *their subsequent interest being distinct, and no interference with each others future disposition of the goods, or the profit or loss arising from the sale of them.*

2. “ It is essential therefore to make a person subject as  
 “ a partner, that *he is interested in the profits*; that is, that  
 “ the *advantage* that he derives from the trade is *casual*, as  
 “ depending on these profits; for if it is *certain and defined*,  
 “ he is not a partner.”

Grace v. Smith.  
 2 Black. Rep.  
 998.

As here, where the defendant had been partner with one *Robinson*, but the partnership being dissolved, the defendant agreed to let a sum of 4000*l.* remain in *Robinson's* hands *at legal interest* for seven years, and *to receive beside an annuity of 300*l.* per ann.* for the same time; all of which was secured by *Robinson's* bond. It was held that this should not make the defendant a partner, and subject to *Robinson's* contracts; for he had no concern with the business, and the annuity and interest was *certain and independent of the profits.*

Bloxham v. Pell.  
 Sittings Hil.  
 Term 1775.  
 quot Black.  
 Rep. 999.

But where the defendant in this action had been partner with one *Brooke*, and they agreed to separate, and *Brooke* agreed to give him his bond for 248*5*l.** with interest, which  
 sum



sum had been brought by the defendant into trade, and an annuity of 200*l.* for seven years, if *Brooke* so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect *Brooke's* books. The defendant was adjudged to be a partner and liable; for the charge had reference to the profits, it was *casual* as depending on *Brooke's* life, and his right to inspect the books was that of a partner.

3. Where there is a partnership demand, *all the partners should join in the action*, for the contract and undertaking is joint; and if in such case one partner only brings the action, the defendant may take advantage of it at the trial, and nonsuit the plaintiff; for the contract is not the same; but in the case of a tort this must be pleaded in abatement.

Therefore, where the plaintiffs were partners with two other persons of the name of *Grant*; and they were joint owners of a privateer which cruized in company with the defendants, under an agreement to share the prizes equally. They took a prize in the *Mediterranean*, which was condemned at *Misurca*, and divided the money arising from the sale: the sentence there was afterwards reversed here, and restitution ordered: upon which the *plaintiffs alone* paid the whole money (their partners having become bankrupts) and now sued the defendants for the moiety, and they were nonsuited: for if the money was partnership property, the action should have been *in the name of all the partners*; if it was their own, *each* should have had his own action.

But in this case, three persons had employed the defendant to sell some timber for them, in which they were jointly concerned; two of them he had paid their exact proportion, and they had given him a receipt in full of all demands; *the third now brought his action for the remainder being his share*; and it was objected, that as this was a joint employment by three, one alone could not bring his action: but it was ruled by Lord *Mansfield*, That *where there had been a severance*, as above stated, that one alone might sue.

So where the action was for the use and occupation of a house, it appeared that the house was the property of six several tenants in common; to all of whom, except the plaintiff, the defendant had paid his rent; and this action was for his share of the whole rent. It was objected, that one tenant in common alone could not bring this action, but that all ought to join: but Lord *Mansfield* over-ruled the objection, and the plaintiff recovered.

So

*Leglife v. Champanite.*  
2 *Str.* 820.

*Graham v. Robinson.*  
2 *Term Rep.* 282.

*Garret v. Taylor, Sitt. G. Hall.*  
*Trin.* 4 *G.* 3. *MSS.*

*Kirkman v. Newstead.*  
*Sitt. Westm.*  
1776. *MSS.*

Martyn v.  
Crump.  
Salk. 444.

So where one partner dies, the other should bring his action alone : for the executor and the survivor cannot join, for the remedy survives, but not the sum recovered ; and therefore on recovery he is liable to the executor for part.

Smith v.  
Barrow.  
2 Term Rep.  
476.

And for a sum of money due to the partnership, the surviving partner may bring an action in his own right, and not as survivor, *against a person who has received it after the death of the other partner* ; for against this person the deceased partner never had any right of action, and so the plaintiff need not declare as surviving partner : and tho' the person who has so received the money is an after-taken partner, and has carried the money to the partnership account, yet will this action lie ; for the defendant has wrongfully applied money belonging to the plaintiff, and must therefore be answerable for it.

Rice v. Shute.  
5 Burr. 2611.  
2 Black. Rep.  
695.  
Abbot v. Smith.  
2 Black. Rep.  
947. S. C.

4. But if an action of *assumpsit* is brought *against one partner without joining the other*, the defendant must take advantage of it by pleading that matter in abatement ; for if he was allowed to give it in evidence, and so to nonsuit the plaintiff, it would be endless litigation, unless the plaintiff knew all the partners : but when the defendant pleads in abatement, he sets out all his partners, and the plaintiff knows against whom to proceed.

Per Lord Mansfield.  
5 Burr. 2613.  
2 Black. Rep.  
696.

" For all contracts with partners are joint and several, and every partner is liable to pay the whole ; and in what proportions the others are to contribute is a matter merely among themselves ; the plaintiff may however bring his action against one, but *he* may compel by a plea in abatement the plaintiff to join them all : and if he brings his action against all, yet he may take out execution against one only."

Symonds v. Par-  
minter.  
1 Will. 78.  
Darwent v.  
Walton.  
2 Atk. 510.

But if one partner is out of the kingdom, and not amenable to the process of the court, the defendant may proceed singly against the other : but the plaintiff must first proceed to outlawry against the partner who is absent.

Hyatt v. Hare.  
Comb. 283.

So if two partners buy goods, and one of them dies, the survivor may be charged in *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead, and he surviving partner.

7. The next class of contracts I shall consider with reference to the person, are these arising in the case of

#### BANKRUPTS.

These are, 1st. By the assignees. 2dly. Against them.

1. Of Actions by the Assignees.

1. "The assignees standing in the place of the bankrupt, 3 Wils. 307.  
"are invested with all the rights of property of the bank-  
"rupt; and whatever property of the bankrupt is in the  
"hands of others, after an act of bankruptcy committed,  
"or comes to him before his certificate is allowed, be-  
"longs to the assignees, and may be recovered by them in  
"this action."

Therefore where a legacy had been given to a bankrupt, Tudway v.  
and the testator died when the certificate had been signed Bourne.  
by four-fifths in number and value of his creditors, and by 2 Burr. 716.  
the commissioners, but before it had been confirmed and  
allowed by the Chancellor. This was adjudged to belong  
to the assignees, the certificate not being complete when  
the bankrupt became entitled to the legacy.

*Assumpsit* therefore also lies to recover back money which  
has been levied by the sheriff under a *fieri facias* against the  
goods of the bankrupt, issued after he had committed an act of  
bankruptcy, against the plaintiff, at whose suit the *fieri facias*  
was sued out: for from the moment a person becomes a  
bankrupt, the property of all his goods, debts, and credits,  
vests in the assignees. Here the act of bankruptcy having Kitchin v.  
preceded the sale by the sheriff, and he having paid over Campbell.  
the money to the plaintiff in the action, he was held to be 3 Wils. 304.  
the receiver of so much to the use of the assignees as was  
the produce of the bankrupt's goods sold by the sheriff:  
and it was recovered in this action. The idea formerly  
was, that the assignees were obliged to proceed as for the  
tort in taking the goods,

2. But it is enacted by statute 1 Jac. 1. 15. "That no  
"debtor of the bankrupt shall be endangered for the pay-  
"ment of his or her debt, truly and *bona fide* made to such  
"bankrupt before such time as he shall understand or know  
"that he was become a bankrupt.

"Before this statute, if a debtor to the bankrupt had  
"fairly paid a debt due to the bankrupt after he had com-  
"mitted a secret act of bankruptcy, though it was not  
"known to the debtor, he was liable to the assignees: but  
"by this statute he is protected; but if he pays what he  
"owes to the bankrupt after he has knowledge of the act of  
"bankruptcy, he is liable notwithstanding to the assignees."

As where the defendant who was a bankrupt paid drafts Vernon v.  
drawn on him by the bankrupt after he knew of the act of bank- Hankey.  
ruptcy, he was compelled to pay the amount again to the as- 4 Term Rep.  
signees. 113.

But

Foster v. Allanson.  
2 Term Rep.  
479.

But payments made *voluntarily*, as in the last case, are only liable to be so over-reached by the act of bankruptcy; for if *an action is brought* against a person having money of a trader in his hands by a creditor, though he knows that the trader has committed a secret act of bankruptcy, yet it will be no defence to the action to rely on such secret act of bankruptcy; for perhaps a commission might never be sued out, and then the debtor never would pay at all.

“ But where a debtor to the bankrupt has notice *that a commission will issue*, grounded on an act of bankruptcy then committed, he can in no case pay the money to the bankrupt; and in such case it is not necessary *that the act of bankruptcy should be compleat* at the time of the notice, for by the relation back the effect will be the same, if the act of bankruptcy was inchoate at the time of the notice.”

King. Ass. of  
Langman v.  
Leith.  
2 Term Rep.  
141.

Therefore in the present case, the bankrupt had been arrested on the 19th of Jan. at the suit of the plaintiff who was now assignee, and became a bankrupt by lying two months in gaol, which time expired on the 26th of March. On the 19th of Feb. the plaintiff's attorney wrote to the defendant (who had been employed by the bankrupt as a broker to sell his effects) *not to sell them, as Langman had committed an act of bankruptcy; and that a commission would shortly issue against him*, which would relate to the day when he was first arrested; notwithstanding which the defendant sold the goods *before the two months expired*, and paid the money over to the bankrupt: It was adjudged, that this was not a payment made by the defendant within the stat. of Jac. as there was notice to him, while the act of bankruptcy was inchoate; and which afterwards being compleat, vested the property in the assignees from the first arrest; and that therefore the defendant was liable as for money had and received to their use.

3. And by statute 19 Geo. 2. c. 2. “ If money on bills of exchange, or in the course of business, is *bona fide* paid by the bankrupt to a fair creditor, though after a secret act of bankruptcy committed, it shall not be liable to be refunded, provided such creditor *had no notice* prior to the receiving of his debt that the debtor was insolvent.”

Before this statute, If a creditor of the bankrupt had received payment of his debt after a secret act of bankruptcy, he was liable to refund it, though at the time he did not know of any act of bankruptcy committed: but this statute protects all payment fairly made without knowledge of it.

“ But

" But it confines strictly to the terms of it, all disposition of his property by the bankrupt, so that after an act of bankruptcy committed, he can only dispose of his property in the regular course of trade, as by paying goods when delivered, or bills of exchange or notes when regularly due."

For where the act of bankruptcy was committed on the 22d of May, 1785, but unknown to the defendant or any of the creditors: some months prior to the bankruptcy, the defendant had sold an estate to one *Utterson*, who paid him for it by a bill of exchange drawn on the bankrupt, and payable the 7th of February of the same year. The defendant applied for payment when it became due to the bankrupt, but was told that it was not then convenient to pay it, but that if he would hold the bill, that he should be allowed interest. He did so till the 22d of May, 1785, when he demanded payment, and received the money without knowing of the act of bankruptcy, which was now recovered back by this action, the court being clearly of opinion, that it was not a payment made in the course of business, and so was not protected by the statute.

Vernon Assignee of Tyler v. Hall.  
2 Term Rep. 640.

## 2. As against the Assignees of a Bankrupt.

Where the plaintiff's testator had proved a debt against the bankrupt estate, to which the defendant was assignee; it was held that the executor might maintain *assumpsit* against the assignees under an order for a dividend, and that the proceedings before the commissioners should be conclusive evidence of the debt. And it was further adjudged in this case, that for that reason, the assignees shall not be allowed to plead a set-off; for as the commissioners have a power of setting off mutual debts, the debt proved and allowed shall be deemed the balance.

Brown executor v. Bullen.  
Doug. 392.

## 8. The next is the case of

### EXECUTORS.

*Assumpsit* lies against an executor on a promise by the testator.

Norwood v. Read.  
Plowd. 181.

So he may also maintain this action on a promise made to the testator.

9. The next class of contracts which I shall consider as in relation to the person, are those respecting

### HUSBAND

## HUSBAND AND WIFE.

1. How far the husband is chargeable with the wife's contracts. 2. How far he is benefited by her contracts.

1st. Contracts entered into by the wife *before marriage*. 2dly, Such as she enters into *during cohabitation*. 3dly, Such as she may have entered into *after elopement from her husband*. 4th, Such as she enters into *after having been turned away by her husband*. 5th, Such as she enters into *after a separation, where she has a separate maintenance*.—Under each of which heads, I shall inquire how far the husband is liable.

*1st. Of the Wife's Contracts before Marriage.*

2 Black. Com.  
420.

The husband is liable to all debts contracted by the wife before marriage; for as by marriage he becomes entitled to all her property, he shall take it subject to her debts.

Heard v. Stamford.  
3 P. Wms. 409.

But if a woman be indebted *dum sola*, and marries and brings a portion to her husband and dies, the creditor shall lose his debt, unless he has sued for it and recovered it in the wife's lifetime, unless she has left choses in action sufficient to satisfy the debt; for by the law the husband is only liable to his wife's debts during coverture, unless there has been a judgment against him in wife's lifetime.

*2d. Of the Wife's Contracts during Cohabitation.*

1 Sid. 120.

1. " *During the cohabitation of the husband and wife, he is answerable for all debts contracted by her for necessities, from the implied credit arising from cohabitation, but for nothing further.*"

Manby v. Scott.  
2 Lev. 4.

And these necessities are to be judged of *with reference to the estate of the husband, and of his degree or rank in life*. For an high degree may have a low estate. And of this matter the jury are to judge, and to find accordingly, so they are also to find the assent as well as cohabitation of the husband.

" But

" But the husband is not even liable for necessaries, if  
 " *the debt has been contracted under illegal circumstances.*"

As where the defendant's wife was in custody in execution, on a charge of subornation of perjury, and of course should have been in prison, but was suffered to remain at the house of the plaintiff who kept a *spunging-house* within the Rules, who furnished her with necessaries, for which this action was brought: the defendant had judgment; for her being in plaintiff's house was illegal, she not being such a prisoner as was entitled to the benefit of the Rules, and in such case the law will not raise an implied promise to charge the husband. Fowler v. Dinely.  
2 Stra. 1122.

2. " And as the husband is charged by the wife's contract, on his implied consent to provide her with necessaries during cohabitation, *therefore where he shews his dissent he shall not be liable, as by a general notice to all tradesmen not to trust his wife, which seems to be sufficient.*" Bull. N. P. 135.

As where in an action against the husband for goods sold and delivered to the wife during cohabitation, it was proved that she was very extravagant, and used to take up clothes to a large amount, and pawn them at an under-value, and that the husband had given notice to the tradesman who was the plaintiff in this action *not to trust her further*, the husband was held not to be liable for the goods so taken up after that notice of his express dissent. Etherington v. Parrott.  
Salk. 118.

And in this case the *Ch. Just. Holt.* further held, " That S. C.  
 " if a woman takes up goods (as silks) for the purpose of  
 " making them into clothes, and pawns them before they  
 " are so made up, the husband is not liable, for they never  
 " came to his use: otherwise if made up and worn, and  
 " then pawned."

" But the wife can in no case *borrow money*, even to pay  
 " for necessaries, as she might squander it."

Therefore this action will not lie for money lent to the wife, for she can make no contract; but if it be at the special instance and request of the husband, it is good; for it is then a loan to him. 1 P. Wms. 183.  
Stephenson v. Hardy.  
3 Will. 388.

" So in the case of goods, a delivery to the wife at his request is a delivery to him."

For where the plaintiff declared, for meat, &c. found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife at his request Rofs v. Noel.  
Pasch. 31 G. 2.  
C. B.  
Bull. N. P. 136.

quest during his absence. On a case reserved it was holden, "That a delivery to the wife at the husband's request, "is a delivery to the husband," and that so he is chargeable. But this is during cohabitation. *Vide post Ramfden v. Ambrose.*

*Harris v. Lee.* 3. *And as to what shall be deemed necessities.* Where an husband gave his wife the foul disease, and the debt was for her cure, it was held necessary, and that he was liable.  
1 P. Wms. 182.

*Jenkins v. Tucker.* So where the defendant went abroad, and left his wife in England, where she died, and the plaintiff who was her father, paid the expence of her funeral, which were proportionate to her husband's fortune; they were adjudged to be necessities, and the amount recovered against the defendant.  
H. Blackst. Rep. 90.

### 3d. *Of the Wife's Contracts, where the Husband has turned her away.*

*Robinson v. Greinhold.* 1. "Though the wife be ever so improper in her conduct, yet while she continues with her husband, he is bound to find her necessities, and pay for them; for he took her for better, for worse: *so if he runs away or turns her away*, he is in like manner liable, for he still sends "with her credit for her reasonable expences."  
Salk. 119.

*Bolton v. Prentice.* As where the defendant and his wife lodged at the plaintiff's house, who was a milliner, during which time she furnished the wife with money and other things without the husband's knowledge; he paid for them, but forbid the plaintiff to trust her further. The husband and wife cohabited together for a year after, when he turned her out of doors, and declared he would not maintain her. In this distress she applied to the plaintiff, who furnished her with necessities according to her degree, for which this action was brought: when it was resolved, that the causeless turning her away gave her a general credit, and that he being the wrong-doer could not give such a prohibition to furnish her.  
2 Stra. 1214.

Per Lord Mansfield. 2. And Note, That if a man cohabits with a woman, allows her to assume his name, and passes her to the world for his wife, though in fact he is not married to her; yet is he liable to her contracts for necessities. And therefore *ne unques accouple in loyal matrimonie* is a bad plea in an action on the case for the debt of a wife; and on demurrer, plaintiff  
*Hudson v. Brent.*  
Sittings after  
Hil. 26 Geo. 3.  
*Norwood v. Stevenfon.*  
Trin. 11 & 12  
G. 2. B. R.  
Bull. N. P. 536.



plaintiff would have judgment: it is good only in dower or an appeal.

4th. *Of the Wife's Contracts after Elopement.*

1. "If the wife elopes, and goes away from her husband; when such separation becomes notorious, whoever gives her credit does it at his peril: for the husband is not liable unless he takes her again; for then the cases are governed by analogy to those at common law where a woman had eloped, she thereby forfeited her claim to dower: but if the husband received her again, her right to dower was revived." Robinson v. Greinold. Salk. 119.

And where a wife has so eloped and got credit, though the tradesman who furnished her with necessaries *has no notice of her elopement*, yet he shall not recover against the husband, against whom the act of elopement destroys all claims. Morris v. Martyn. 1 Stra. 647. 1 Stra. 706. S. P.

So it seems to make no difference whether the elopement is adulterous or not; for in no case shall the husband be charged. But if the elopement be not adulterous, Lord Raymond seemed in this case to think, that the husband's refusal to take her again might, *from that time*, excuse the elopement. Child v. Hardyman. 2 Stra. 875.

2. "So neither shall the wife herself be charged for goods furnished to her during the elopement and absence from her husband."

For where she was sued as a *feme sole* for a carriage furnished to her by the plaintiff, during her elopement; on the ground of her having eloped from her husband and living separate, it was adjudged against the plaintiff; for she was a *feme covert* still as to every right but dower, and not to that, if adultery was proved; and so could not be sued alone. Hatchet v. Baddeley. 2 Black. Rep. 1079.

And *Note*, That where the husband and wife live separate, if an action is brought for necessaries or the maintenance of the wife, it should not be laid as for necessaries furnished to him; but the special matter should be stated; for otherwise a recovery in that action would not be a bar to a special one brought for the maintenance of the wife. Ramfden v. Ambrose. 1 Stra. 127. Harris v. Collins. Trin. 12 G. 1. Bull. N. P. 136.

5th. *Of the Wife's Contracts, having a separate Maintenance.*

1. "Where the husband and wife part by consent, and *she has a separate maintenance from the husband, she shall* in all cases be subject to her own debts."

Ringstead v. Lady Laneborough. Mich. 23 G. 3. & Hill. 23 G. 3. Corbet v. Poelnitz. 1 Term Rep. 5. S. P. This was first decided and settled in this case where in actions against the defendant for goods sold, she pleaded coverture and the plaintiff's replication, that she lived separate and apart from her husband, from whom she had a separate maintenance, and so was liable to her own debts, was on demurrer holden to be good, and the plaintiff had judgment.

Barwell v. Brooks. Hill. 24 G. 3. MSS. In the case of Lady Laneborough, the plea stated coverture; but *that her husband lived in Ireland, which being out of the process of the court, some stress was laid on it in the decision*; but in this case it was decided as a general principle, that the husband was not liable in any case where the wife lived apart, and had a separate maintenance; and this principle was recognized in *Corbett v. Poelnitz*, which followed it.

2. "And it seems therefore that a personal knowledge of the separation of the husband and wife, and of her having a separate maintenance, is not necessary in order to discharge the husband; for if it be publicly known in the place where the parties live, it is sufficient; and that the notification need not be in the place where the wife afterwards runs in debt."

Todd v. Stokes. Salk. 116. Case K. B. 244. S. C. And accordingly in this case, where the husband lived in *Chichester*, where he had parted from his wife, and the action was for drugs furnished to his wife in *London*: it being proved that the separation had taken place five years before, during which time she had had a separate maintenance, *Holt, Ch. Just.* held that the husband was not liable. For it was not to be presumed, but that tradesmen that dealt with her trusted her on her own account, and not on the credit of her husband; and a personal notice was not necessary, it was sufficient if it was publicly and commonly known.

3. "But when the husband and wife live apart, the wife must have a separate maintenance *from the husband*, in order to discharge him."

Therefore

Therefore where the wife had a *pension* during pleasure: Thompson v. it was held, that this should not be deemed such a separate Harvey. maintenance or alimony, as should discharge the husband 4 Burr. 2078. from a demand against him for necessaries furnished to her, where he had turned her out of doors.

4. "On the same foundation as that of separate maintenance, wherein the wife is considered as sole, *wherever the husband is in circumstances not to be sued, as not amenable to the process of the court, the wife shall be sued as sole.*"

As where the husband of a feme covert is an alien enemy, Derly v. or has abjured the realm; in such case the wife is chargeable Dutchess of as a feme sole. Co. Litt. 132. b. 133. a. Massarene.

So where the husband of a woman had been transported, the wife was held to be suable as sole. Salk. 116. 1 Lord Raym. 147. S. C. Sparrow v. Caruthers.

And, lastly, By the custom of London a feme covert Per J. Yates. carrying on business in London on her own account, is 2 Black. Rep. liable to her own debts, independent of her husband. 1197.

2. So far is the husband subject to the debts and contracts of the wife. We shall now enquire *how far he is benefited by her contracts.*

1. "Whatever the wife earns during coverture belongs to the husband; and he shall bring an action for it in his own name."

For where the husband and wife brought an action against the defendant for work done for him by the wife. And on demurrer the defendant had judgment, for the husband should have brought the action alone; for the action being a general *indebitatus assumpsit*, no promise shall be supposed to have been made to the wife: and as the wife's debts would fall against the husband's estate, so the profits of her labour shall go to him or his executor. Buckley v. Collier. Salk. 114.

"But where there is an express promise to the wife, the husband may assent to make it a joint contract; and then she may join." 2 Black. Rep. 1239.

As where any act is done by the wife (as the delivery of money) and the promise is made to her, though done without the authority from the husband; yet he may after assent to it, and they may join in the action. Pratt & Ux. v. Taylor. Cro. Eliz. 61.

So where the consideration was, that if the wife would cure the defendant of a wound, that he would pay her 10*l*. It was held, that the cause of action arising from the labour Brathford v. Buckingham. Cro. Jac. 205.

labour and skill of the wife, and the promise being made to her, that she might join her husband in the action.

Bidgood v. Way  
& Ux.  
2 Black. Rep.  
1236.

Therefore in all actions of *assumpsit* wherein the husband and wife join, *the interest of the wife must be stated*: for otherwise, as the wife can make no contract and the husband has the benefit of all made by her, the *assumpsit* shall be deemed to be only to the husband, unless her interest specially appears. As in the cases just stated; so *where she has a separate property*: so if the cause of action existed before her marriage; in which cases she should join.

Strutcliffe—  
1 Stra. 80.

But where the wife married a second husband, the first being living, but he not being privy to it; it was held by *C. J. Parker*, that she should be deemed to be as a servant to the second husband, and that so he should have what she earned during cohabitation with him.

Warr v. Hunt-  
ley,  
Salk. 118.

2. Where an ordinary working man married a woman of like condition, and after cohabitation for some time left her, and during his absence the wife worked, and the action was brought for her diet: it was held, that the money she earned should go to keep her.

10. Lastly, As to actions against

#### OFFICERS OF THE REVENUE.

It has been decided,

“ That where money has been extorted by an officer of the revenue, who had seized goods illegally, to induce him to restore them to the owner, such money may be recovered back again in this action.”

Irving v. Wil-  
son.  
4 Term. Rep.  
485.

For where the plaintiff was owner of a quantity of hams, which were coming from Scotland, in three carts, and he had a permit for their removal. One of the carts being a mile and a half before the rest, was met by the defendants, who were excise officers, who demanded the permit: they were informed that it was with the carts which were behind; notwithstanding which they seized the three carts. Afterwards the matter being explained, they refused to deliver up the carts, unless 2*l.* 11*s.* was paid for their release: this sum was paid, and this action brought to recover it back. It was adjudged, that this money was clearly recoverable, as being obtained by extortion from the plaintiff: and it was further resolved, That though, under stat. 23 *Geo.* 3. c. 70. s. 30. the officer is entitled to a month's notice before action brought against him;

him; yet that in this case he was not, for this action was for an act not done *colore officii*, and therefore notice was not necessary. And *Grose, Just.* was of opinion, that the statute applies only to cases of trespass or tort, not to actions of *assumpsit*.

But in this case, where an excise officer had received from the plaintiff a sum of money for duties on cotton, after the statute imposing them had been repealed; but *had paid it over to his superior officer before the action brought*; it was resolved, that in this case *assumpsit* for money had and received would not lie: for the payment by the plaintiff was voluntary, and the officer on receiving it was compellable to pay it over, and therefore should not be subjected to an action for doing what was his duty. And the court were further of opinion in this case, that the officer was entitled to notice under stat. 23 Geo. 3.

*Greenway v. Hurd.*  
4 Term Rep. 553.

5. "Having now considered the several foundations of this action, and the persons by and against whom it may be maintained, it now remains to consider,"

### III. THE PLEADINGS AND EVIDENCE.

#### I. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

Before I treat directly of the pleadings, I shall premise as to the time when this action may be commenced.

"That where the debt is to arise from several acts to be performed at different times, each performance is a distinct duty, for which an action may immediately be brought."

For where in this case the plaintiff sold sixty comb of barley to the defendant, which was to be delivered before *Christmas*, and the plaintiff delivered fifty comb before that time, and then brought his action for the amount of that parcel: it was resolved, that though the agreement was entire, yet that every delivery made a several contract, which would maintain this action.

*Barker v. Sutton.*  
Norfolk Ass. 1662.  
Per Hale.  
Trials p. Pais 186.

So where the contract was to pay 20*l.* by 10*l.* at *Mich.* 1631, and 10*l.* at *Mich.* 1632; it was adjudged, that the plaintiff might maintain his action immediately, on the first payment becoming due.

*Milles v. Milles.*  
Gro. Car. 241.

I now proceed to the pleadings.

K

1. "Where

Per Lord Mansfield.  
Douglt. 24.  
1 Term Rep.  
134

1. "Where there is a *special contract or agreement*, the plaintiff ought to declare on it, for the defendant ought to have notice that he is sued on it; and the plaintiff should not be allowed to go into evidence of any special agreement on a general count in *indebitatus assumpsit*, by which the defendant might be taken by surprise, unless he had notice from the plaintiff that he meant to rely on the general as well as special ground."

Knight v. Cox.  
Suffex, 1682.  
Bull. N. P. 153.

Therefore where in *indebitatus assumpsit* for goods sold and delivered, the defendant pleaded *non assumpsit*, and gave in evidence that he had become insolvent, and that the plaintiff and his other creditors had given him a letter of licence to recover the debts due to him, which he had done, that they had received four shillings in the pound, and that the plaintiff and the other creditors had signed a release: the plaintiff pretended, and would have given in evidence that the defendant had given a note, promising to pay the entire debt, if he would sign the release, and produced the note. But Pemberton, Ch. Just. refused to admit it, and held that the release was good evidence for the defendant on *non assumpsit*, and that the plaintiff ought to have declared specially on the special promise, if he meant to have availed himself of it.

2. "Where the *assumpsit* is founded on an agreement in which something is previously to be performed by the plaintiff, on condition of which the defendant undertakes to pay: it is necessary for the plaintiff in his declaration to aver either a general performance of his part, or that he is ready to do it, and also a notice by request to the defendant."

Collins v. Gibbs.  
2 Burr. 899.

For where the plaintiff declared that, on the compromise of a suit, the defendant undertook to pay him a certain sum of money in consideration of his executing to the defendant a general release. In *assumpsit* for the money, and judgment by default, the judgment was arrested, for the reason that the plaintiff had not averred that he had executed the release, or was ready to do it, which was necessary to support the action, the release being a condition precedent: but it was further held, that the want of the averment would be helped by a verdict: therefore the defendant should take the advantage of the omission, either by demurrer, or, if the judgment was by default, by arrest of judgment.

"And therefore notice and request to the defendant should be averred. For there can be no default in the defendant  
"till

"till he has had notice of the performance of plaintiff's part."

Therefore where in *assumpsit* the plaintiff declared on an agreement by the defendant to pay him for one load of wood at the same rate he sold the rest of it, and shewed that he had sold to the defendant one load, and averred that he had sold the rest for 23*l.* the load, and that the defendant had not paid, the plaintiff had a verdict in *K. B.* On a writ of error the judgment was reversed, because there was no averment that the plaintiff had given the defendant notice of the sale and price of the rest, which was a thing of his own private knowledge. *Holmes v. Twist.* Hob. 31.

So where the *assumpsit* was to pay to the plaintiff so much on his coming into *Somersetshire*; judgment was arrested after a verdict, because the plaintiff had not averred in his declaration notice of his coming, and a request to the defendant to pay. *Richards v. Carvamel.* Hob. 68.

But where the notice is not to come from the plaintiff himself, but from a collateral matter which may be within the defendant's own knowledge (as to pay as much as *I. S.* does) there no notice or request is necessary from the plaintiff. — *v. Henning.* Cro. Jac. 432.

And where a notice and request are necessary, a *special request must be averred*; for the general averment in all declarations of *licet sapius requisitus* will be insufficient; that is, will not be considered as sufficient notice: it ought to be set forth that the court may judge if they were sufficient. *Per Eyre, Just.* 1 Stra. 89.

So that the rule seems to be,

"That where the defendant is chargeable on a collateral matter, and not on a mere debt, there ought to be a request precisely alledged in point of time, place, &c. But where the *assumpsit* is for a preceding debt, which was due before, then the general allegation of *licet sapius requisitus* is sufficient; for the bringing the action is a request." Though *Eyre, Justice*, denied those cases from *Crute* to be law. *Silman v. King.* Cro. Jac. 183. *Hill v. Wade.* Cro. Jac. 523. *Birks v. Trippet.* 1 Saund. 33.

Therefore in declaring on a note of hand no request is necessary, for it acknowledges a debt, and the bringing the action is a request. *Frampton v. Coulson.* 1 Will. 33.

So where the plaintiff declared that the defendant, in consideration that he would make him a set of sails worth 45*l.* promised to pay so much on request, and averred that he made the said sails, and that the defendant though often requested had not paid; to this was a special demurrer for cause, *Wallis v. Scot.* 1 Stra. 88.

cause, that there ought to be a special request laid; but it was over-ruled, for on the making of the fails the money immediately became due.

Morris v.  
Kirke.  
Cro. Eliz. 73.

"So in all cases where money is to be paid on an executory consideration, the plaintiff should set out the day when and place where the consideration was performed, because it is traversable."

Sexton v. Miles.  
Salk. 22.  
Show. 50.  
S. C.

Therefore in *assumpsit* where the plaintiff declared that, in consideration that he would deliver, &c. the defendant undertook to pay, &c. and in fact says, that he did deliver, but does not alledge a place where: the defendant demurred for want of a venue, and the declaration was held ill; for a consideration executory is traversable, and therefore the place necessary to be shewn."

2. "Where the action is brought on mutual promises, they must be both made at the same time, or else it will be *nudum pactum*, and so no action will lie: and when they are to be performed at the same time, the plaintiff in such case need not aver performance."

Nicholas v.  
Rainbred.  
Hob. 88.

*Assumpsit* on an Agreement, where in consideration that the plaintiff agreed to deliver to the defendant a cow, he promised to give the plaintiff fifty shillings. It was held, that the plaintiff need not aver the delivery of the cow, for it was promise for promise.

Martindale v.  
Fisher.  
1 Wils. 88.

So where the *assumpsit* laid was that the plaintiff had agreed to deliver to the defendant three yards one-eighth of cloth; and the defendant agreed on a certain contingency happening to pay for the same 5*l.*; but if the contingency did not happen, that he was to pay nothing. The contingency did happen, and on action brought, the plaintiff had a verdict; when it was moved in arrest of judgment, that the plaintiff had not averred the delivery of the cloth; but it was resolved, that this being promise for promise, no such averment was necessary: but if it had been that defendant undertook to pay if plaintiff would deliver so much cloth, there the condition would be precedent and an averment of performance necessary.

3. "Where the plaintiff's action is to arise from some precedent act to be done by himself, he should aver and shew his right to do such act, and also his performance as far as he could. For otherwise he might recover for a consideration which he could not perform."

Luxton v. Robinson.  
Doug. 598.

In *assumpsit* on an agreement to forfeit a deposit of five guineas; and also to pay another sum of 10*l.* if the defendant did not accept possession of certain premises from the



the plaintiff, and also pay for certain fixtures therein at a fair appraisement by two appraisers. In *assumpsit* on this agreement, it was adjudged on special demurrer, that plaintiff's declaration was ill, because he had not *shewn his right* to the premises, so that he could have delivered possession according to his agreement, and also if each was to name an appraiser that he had done so.

" And for the same reason if the plaintiff *avers perform-*  
*ance*, he must also shew *how* performed, that the court  
 " may judge if the performance is sufficient to entitle him  
 " to the action."

For where the plaintiff declared, that being entitled to a rent-charge out of lands of which the defendant had the reversion; that the defendant promised, that if he would relinquish the rent that he would pay him 30*l.* and the plaintiff avers that he did so relinquish the rent, and brings his action for the 30*l.*; and after verdict for the plaintiff, the judgment was arrested, for that the plaintiff in his declaration had not shewn *how he had relinquished the rent*; for it might have been *by words*, which would have been no discharge.

So where the defendant promised to deliver an horse to the plaintiff, on the plaintiff's becoming bound to him by writing obligatory for 1*l.* the plaintiff in his declaration only averred *his offer* to become bound, and had a verdict: but judgment was arrested, for plaintiff should have averred *a tender of the bond ready sealed to defendant, and also the sum he was bound in*, for the court to judge of the performance, which here he had not done.

And if the plaintiff declares *on two considerations*, he must aver the performance of both; for the *assumpsit* on the part of the defendant shall be presumed to be founded on both considerations taken together.

4. " In declaring in *assumpsit*, it is always necessary to set out *for what the debt became due*, and not generally; that the defendant being indebted, undertook to pay, &c. For the debt might be due by *specialty*, in which case this action would not lie." *Ante* 96.

But if it sufficiently appears from the declaration that the debt is not due by specialty, as if it is *pro opera & labore* generally, without saying what work, it is good.

So where it was for *necessaries furnished to a sick man*, without saying what necessaries, it was held to be good: for such were *simple contracts* on the face of them.

5. " In

Gregory v. Nevill.  
Cro. Eliz. 292.

Aulien v. Gervas.  
Hob. 69, 77.

Laneret v. Rivett.  
Cro. Jac. 503.

Woodford v. Deacon.  
Cro. Jac. 206.  
Cooke v. Samburne.  
1 Sid. 182. S. P.

Hibbart v. Courthope.  
Carth. 276.

Cripps v. Bainton.  
3 Bulst. 31.

5. " In declaring in *indebitatus assumpsit* for money lent and advanced, it must always be for money lent to the defendant himself."

Marriot v.  
Lyfter. 2  
2 Will. 141.

Butcher v.  
Andrews.  
Salk. 23. S. P.

For where the plaintiff declared in *indebitatus assumpsit* for money lent by him to one James Dalrymple, at the special instance and request of the defendant, the judgment was arrested, for the word *lent* is a technical term, and imports a loan to J. Dalrymple; if so he was the debtor, and therefore the defendant could not also be indebted, for there cannot be a double debt on a single loan. But it had been otherwise, had the plaintiff declared for money delivered to such a person at the request of defendant; for then the loan had been to the defendant himself.

Stephenson v.  
Hardy.  
3 Will. 388.

But where the plaintiff in this case declared for money lent to the defendant's wife at his request; and it was attempted to arrest the judgment on the authority of the cases above, the court held, that a loan to the wife at the husband's request, was a loan to the husband himself, and the plaintiff had judgment; for the husband and wife are but one person.

6. " The breach assigned in the declaration should always follow the undertaking stated, or the plaintiff cannot have judgment."

Wright v. Johnson.  
1 Vent. 64.

For where in *assumpsit*, the plaintiff declared that the defendant undertook to deliver an horse of the plaintiff's in as good plight as he borrowed him; and the breach assigned was, that he had not delivered him at all. The defendant had judgment; for the breach was inconsistent with the undertaking.

Harman v.  
Gwden.  
Salk. 140.

7. In *assumpsit* by the defendant in consideration of 20*l.* to deliver on or before such a day, as the 5th of June, corn or such, that defendant did not deliver on the 5th of June, is a good assignment of the breach, though the defendant might have delivered it before that time: for the defendant might, on *non assumpsit*, give a delivery before that day in evidence; and as the defendant could not make a tender before that day, it shall not be presumed that the plaintiff was there to receive it sooner.

8. " If the plaintiff in his declaration undertakes to recite a statute, and that statute is the ground of the action, and misrecites it, it is fatal: for so the plaintiff would not prove his whole declaration, the statute being the first thing to be proved."

In

In *assumpsit* to recover forty shillings due to the plaintiff Rann v. Green. is vicar of Trinity parish Coventry, under an order made by Cowp. 474. the Chancellor and the two chief justices, for the payment of tithes, in pursuance of a power given to them for that purpose by statute 4 & 5 Phil. & Mary, the plaintiff in his declaration stated the statute to be the 4th of Phil. & Mary. For which variance he was, on producing the statute, and it appearing to be the 4th and 5th Phil. & Mary, nonsuited.

9. "In *assumpsit*, the day of the promise laid in the declaration is not material."

For where the plaintiff in this action declared on promises to pay the 16th of Jan. 1706, the defendant pleaded *actio non accrevit infra sex annos*. The plaintiff replied, that a bill had been filed 23d Jan. 1714, and that the cause of action arose within six years before. Defendant demurred generally, and shewed for cause a departure: for that if the *assumpsit* was within six years preceding the 23d of Jan. 1714, it would not be on the day laid in the declaration, viz. 16th of Jan. 1706, which is more than seven years, and so there was a departure in assigning a different day: but the demurrer was over-ruled, for this being a parol promise, the time alledged in the declaration is only matter of form, not of substance; so that not being a departure in a material part, there should have been a special demurrer for want of form, not a general one. Cole v. Hawkins. 1 Stra. 21.

So where the plaintiff, who was a taylor, brought this action, and six several promises were laid, all upon the 16th of October, the defendant pleaded *infra statum* to all generally. The plaintiff replied as to two of the promises, that the defendant was at the time of making these of full age, and as to the rest, that they were *pro necessario vestitu*. The defendant demurred, for that the promises being all laid on the same day, that it was repugnant, that he could not be at the same time of full and not of full age: but it was held, that the time was a circumstance in no wise material, nor part of the issue; that the plaintiff was not tied to a precise day in his declaration, and if the defendant force him to vary, that it was no departure. Howard v. Jenkinson. Salk. 223. Matthews v. Spicer, 2 Stra. 806. S. P.

And so where the cause of action is to arise on a request, King v. Bray. the day of the request is not material; for it may be laid at one time in the declaration, and a request at another time given in evidence. Sid. 68.

So

Pugh v. Robinson.  
1 Term Rep.  
116.

So where the plaintiff declared on promises; the breach was assigned on the 6th of *November*, and the declaration was of the same day, being the first of *Michaelmas* term: to this there was a special demurrer for cause, that the declaration bore date before the cause of action; the promise being laid the first day of the term, and there being no fraction of a day allowed: but the demurrer was over-ruled; for the first day of term is only to be reckoned from the time the court began to sit, and so the breach might precede it.

“But where the day makes a part of the contract, and so is of substance, in that case assigning a different day in the replication from that assigned in the declaration, would be a departure.”

Stafford v. Forcer. quot.  
1 Stra. 22.

As is the case in an *action on a promissory note*, in which the day is material, and of substance. 2 *Stra.* 806. S. C. As where the plaintiff declared on a promissory note, dated in 1704, and the defendant pleaded *actio non accrevit infra sex annos*; the plaintiff replied a bill filed in 12 *Ann.* 1714. For this judgment was arrested.

Desborough v. Kelly.  
Ld. Raym. 533.

9. In *assumpsit* on an *in simul computasset*, the time and place should be laid where the account was settled, or it will be error; for which in this case judgment was reversed.

Erskine v. Murray.  
2 *Stra.* 817.

10. In declaring on a *bill of exchange* against the acceptor, it is sufficient in the declaration to alledge generally *that he accepted it* without averring *that it was in writing*; for such acceptance is only necessary to charge the drawer with costs and damages, and has no operation as to the action between the holder and the acceptor.

Rawlinson v. Stone.  
3 *Will.* 1.

As by the custom of merchants an executor or administrator may indorse over a note or bill of exchange. If indorsee brings an action against the maker of a note, he shall not be called upon for a proof of the letters of administration, for they are in the indorser's hands, not in his.

King v. Thom.  
1 Term Rep.  
487.

So where payee of a bill of exchange being indebted to the testator, indorsed over to the executors a bill of exchange; it was adjudged, that the executors might declare *as such* against the acceptor.

Lee v. Welsh.  
2 *Stra.* 793.

11. The plaintiff declared in *assumpsit* for goods sold and delivered, but omitted in his declaration to say, “In consideration of which the said *W.* undertook and faithfully promised,”

promised," &c. After a judgment by default, it was reversed upon error, there being no promise laid in the declaration.

12. In declaring under the *statute of frauds*, the plaintiff need not in his declaration shew *any note in writing*; but it will be sufficient for him to produce it on trial. 1 Raym. 450.

13. In *assumpsit* against an *infant*, one count in the declaration was *an account stated*, and there was a general verdict; judgment was arrested: for such count is bad as against an infant, who is not to be presumed to be competent to enter into an account. Truman v. Hurst, Mich. 1 Term Rep. 40.

14. The surviving partner may bring an action for goods sold and delivered in the lifetime of his partner (*ante* 117.); and in such case the promise should be laid to have been made to both in the lifetime of the deceased partner, and the breach assigned that the defendant had not paid to the plaintiff and his partner in the lifetime of his partner, nor to the plaintiff since the partner's death. Bullock v. Jackson. West Sitt. Hill. 1773. MSS.

15. In *assumpsit* by the assignee of a bankrupt, the declaration stated, that the defendant was indebted to the bankrupt, and being so indebted assumed to pay *him*, without any *assumpsit* to the plaintiff (the assignee) through the whole declaration. It was held well on demurrer, being like the case of an executor who always declares on a promise to the testator. Rigg v. Wilmer. 1 Stra. 697.

"In *assumpsit* by the assignees of a bankrupt, if it is upon a contract entered into (as for goods sold) by the bankrupt before his bankruptcy, they must declare as *assignees*; but on a contract entered into by the bankrupt after his bankruptcy, they may declare in their own names, and not as assignees."

For where the bankrupt had been a lighterman, and after his bankruptcy sold a lighter to the defendant, who paid him 30*l.* part of the purchase, the assignees discovering the matter, insisted upon having the lighter delivered to them, or the purchase-money paid to them; on which the defendant agreed to pay them the remainder of the purchase-money, deducting the 30*l.* for which the present action was brought, and they declared *without stating themselves as assignees*. The objection was taken as to this mode of declaring, but over-ruled; and on a motion for a new trial, it was resolved, that as the property belonged to the assignees, *that the bankrupt was to be considered as their agent in the sale*, which they afterwards adopted, and that therefore the declaration was good. Evans v. Mann. Cowp. 569.

16. In

16. In an action by an *executor*, if the action is brought on a contract made by himself respecting the goods of the testator, he need not name himself executor.

Rogers v. Cooke. But the plaintiff cannot join in the same action a demand due to himself and another as executor or administrator; for the costs to be recovered are entire, and he can never discover how much he is to have as administrator or executor, and how much as his own.

Per Buller, Just. But an executor may join in the same declaration  
3 Term Rep. several counts for money had and received by the defend-  
660. ant to the use of the testator, and to the use of the executor as such.

Bigg v. Malin, And in declaring *against* an executor on a promise by, his testator, it is not necessary to set out in the declaration that the *defendant has assuts*; for if he has not, it should lie on him to discharge himself by his plea; and if he pleads *non-assumpsit*, he has lost that advantage.

Legate v Pinch-  
ion.  
Cro. Jac. 293.

## 2. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "As the plaintiff is bound to declare on a special agreement, where there is such, he ought to prove the *contract stated* in his declaration expressly as laid."

Anon. The plaintiff in this case declared on an agreement by  
1 Ld. Raym. the defendant, to deliver him *good merchandizable corn*.  
735. per Holt. Proof of an agreement to deliver *good corn of the second sort*, was held not to support the declaration.

Hockin v. So where the declaration was, that the defendant had  
Cooke. agreed to sell *so many bushels of corn*, and breach in the non-  
4 Term Rep. delivery. In evidence it was proved, that the contract  
314. was for the sale of *so many bushels Hartland Quay measure*, which was half a gallon more than the standard *Winchester* bushel: this was held to be a fatal variance, for the bushel mentioned in the declaration could only mean the statute standard bushel.

Payde v. So where the agreement declared on was to deliver to  
Hayes, Oct. the plaintiff stock *on the 22d of August*, and upon the trial  
Stra. 74. the evidence produced from the brokers book was to  
Bull. N. P. 145. transfer *on the opening*: though the broker swore that the 22d of *August* and the opening were the same, yet it was held a variance, and plaintiff was nonsuited.

"For the agreement being the gift of the action, must be stated truly."

For

For where the plaintiff declared on a contract, whereby he was to buy of the defendant all the fat and tallow which the defendant should have to dispose of for twelve months, from 31st of Jan. 1784, at four shillings per stone: the agreement proved was, that the plaintiff was to give four shillings per stone, and if he gave any other person more, that he was to give the same to the defendant. For this variance *Eyre, C. B.* nonsuited the plaintiff; and on a motion for a new trial, the court held the judge's direction to be right, for that the contract produced in evidence was different from that declared on, and so the variance was fatal.

Churchill v. Wilkins.  
1 Term. Rep. 447.

And it has been held, that though the plaintiff has a count in his declaration on a *quantum meruit*, as well as on a special agreement, yet if at the trial he proves a special agreement, but different from that laid in the declaration, the plaintiff cannot recover on either count; not on the first count, because of the variance; nor on the second, because there was a special agreement.

Weaver v. Burrows.  
M. 12 G. 1.  
Bull. N. P. 139.  
1 Stra. 648.  
S. P.

So if the promise alledged be proved, yet if it appear to be made on a different consideration from that stated in the plaintiff's declaration, or if it be proved to have been made on that consideration and another, it shall not support the declaration.

King v. Robinson.  
Cro. Eliz. 79.

So where divers considerations are alledged, some good and sufficient, others idle and vain: if those which are good be proved, it is sufficient, though the plaintiff fails in proof of the others. But if all the considerations alledged are good, all must be proved: for the promise shall be deemed to be founded on all these considerations which are good and lawful. *Ante* 133.

Bradburn v. Bradburn.  
Cro. Jac. 149.

"But where an agreement is in the alternative, and it is in the option of the party bringing the action to sue on either part of it: where he does so bring his action on one part, he need not state the whole of the agreement, for having made his election as to one it then becomes absolute, and he need only state so much as gives him a right to sue; but where the option of the alternative is in the defendant it is otherwise."

As where under the lottery act, 17 Geo. 3. c. 46. "A penalty of 500*l.* is given against any person who shall, in consideration of money, undertake to pay any sum of money, in the event of any ticket or chance in the lottery." The defendant gave a policy, whereby he undertook either to pay a sum of money; viz. 20*l.* or give an undrawn ticket in the number of the policy was drawn. The plaintiff sued for the penalty under the statute, as an agreement by the defendant to pay money in consequence of the drawing of the

Layton v. Pearce.  
Dougl. 15.  
1 Term Rep. 448.

the ticket; but it was decided, that under this agreement *the defendant had an option*, either to pay money or deliver a ticket, therefore the plaintiff could not declare as for a positive contract to pay 20/. and that no action would therefore lie against the defendant, as having the option, he might perform the part not prohibited, that is, deliver an undrawn ticket.

Harris v. Oke at  
Winchester,  
1759,  
Bull. N. P. 139.

"Such is the case of *assumpsit* general, but if the plaintiff declares on a special agreement in *indebitatus assumpsit*, and has also other general counts in his declaration, if he fails in proving the special agreement, he may go into evidence on the general counts."

The rule laid down seems now to be settled, though formerly the question seemed to be doubtful. It first occurred before Lord Mansfield, who in the last case permitted the plaintiff to go into evidence on the general counts, he having failed to prove the special agreement; and this was afterwards confirmed by this case, where in *assumpsit* the plaintiff declared on special agreement to pay his proportion of the expence of a suit, and the plaintiff failed in proving it, he was allowed to resort to the general counts for money laid out and expended, and recovered.

Payne v. Bacombe,  
Doug. 628.

2. "The plaintiff's proof must correspond with his title, as laid in the declaration."

Anon. Salk 282.

For where the action was for money had and received to the use of the plaintiff, and the evidence was, that the money had been received by the defendant on account of the plaintiff's wife, *who was an executrix*, the plaintiff was nonsuited: for the contract to pay was proved to be to the person in a *different capacity* from that declared on.

Dean v. Crane,  
Salk. 28,

So where the plaintiff declared as executor, on a promise to the testator, and on *non-assumpsit infra sex annos* pleaded, gave in evidence a promise made to *himself* within that time. It was held that it should not have been given in evidence in support of the declaration, but that the plaintiff should have declared on a promise to himself.

"So in *assumpsit* against several, a joint debt or contract must be proved; for otherwise, the proof would not correspond with the declaration."

Buller N. P.  
129.

"But where the person bringing the action has looked to the faith of several partners, who are in business together, and has relied on their joint credit, though but one only of the partners has acted, the other partners shall



"shall be charged, unless they shew a disclaimer, and  
"proof of the act of one shall charge them all,"

Therefore, where *Layfield* and the other defendants were bankers, and *Layfield* sold a lottery ticket in the *Double exchange* lottery (in which several bankers were trustees) to the plaintiff, and undertook to pay the prize arising from it, the other partners were held to be liable, no disclaimer appearing, for the lottery having been conducted by bankers, the plaintiff appeared to be well grounded in looking to the joint credit of *Layfield's* partners. — *v. Layfield & alt.* Salk. 292.

3. "It was formerly the opinion, that on account of *Thompson v. infimul computasset*, that the plaintiff was obliged to prove the exact sum laid, but that idea is now exploded, and the plaintiff may now recover part of the sum demanded on this count as well as on any other." *Spencer. Pasch. 8 Geo. 3. Buller N. P. 129.*

But the court will not admit any evidence of an account current, and unliquidated; for that would involve the court in a tedious examination. The account therefore must always be exhibited as an account stated. The practice now is to refer cases of this sort to arbitration. — *Lincoln v. Farr. Keb. 781.*

4. "One of the most usual counts in declaring in this action is for goods sold and delivered; as to that which it is enacted by statute 7 Jac. 1. c. 12. That the shop-book of a trader shall not be evidence after the year; but it is not evidence within the year, except under particular circumstances, as where no better evidence can be had; that is, if the person is living who delivered the goods, he must be produced, for that is the best evidence which can be had."

But where it was proved, that the servant who made the entries was dead; proof of that and of his hand-writing to the entries, and that he was accustomed to make entries, was held to be good evidence, and that no other proof of the delivery was necessary: for it is similar to a witness's attestation to a bond. *Pitman v. M. dox. Salk. 690.*

So where in an action for beer furnished to the defendant, the evidence of the delivery was, that it was the usual way of the plaintiff's dealing for the draymen to come every night to the clerk of the brewhouse, and give an account of the beer delivered out; to which the draymen set their hands: this being proved, and that the drayman was dead who had delivered the beer to the defendant, but that it was his hand-writing subscribed to the book, it was. — *Price v. Lord Torrington. 1 Salk. 285.*

was held to be sufficient evidence. But had the drayman been living, he must have been produced.

*Clerk v. Bedford.*  
Mic. 5 Geo. 2.  
Bull. N. P. 282.

But where the plaintiff, to prove the delivery of wine to the defendant, produced a book which belonged to his cooper, who was dead, but whose name was set to several articles, as wine delivered to the defendant, and a witness was ready to prove his hand-writing; Lord Raymond refused to admit it, saying it differed from Lord Torrington's case, for there the witness saw the drayman (who made the delivery) sign every night.

"And where the witness who made the delivery is himself called, he may use his book of accounts to refresh his memory, but not further."

*Tanner v. Taylor.*  
Hereford Lent  
Ass. 1756.  
MSB.

In an action for goods sold, the witness who proved the delivery, took it from an account which he held in his hand, which he said was a copy of the day-book which he had left at home; and it being objected that the original ought to have been produced, Mr. Baron Legge said, that if he would swear positively to the delivery from recollection, and the paper was only to refresh his memory, that he might make use of it; but if he could not swear to the delivery further than as finding them entered in his book, that the original should be produced; and the witness saying that he could not swear from recollection, the plaintiff was nonsuited.

*Anon. Lord Raym.* 745.

So a man's book of accounts is no evidence for him, though it may be against him, for it cannot be better evidence than his own testimony which is inadmissible.

*Dixon v. Cooper.*  
3 Will. 40.

5. In a trial concerning the delivery of goods according to agreement, *the factor who made the agreement* was admitted as a good witness, *though he was to have a shilling in the pound on the sale*: for he was a mere go-between the buyer and seller, and so might be a good witness for either, as having no interest more on one side than the other.

*Shelley's case.*  
Saik 296.

6. In *assumpsit* against an executor, and *plene administravit* pleaded, the plaintiff must notwithstanding *prove his debt*, or he shall recover but one penny damages though there be assets; for the plea only admits the debt, but not the quantum of it.

*Ld. Fr. Seymour v. D. of Somerset.*  
Rolls 1770.  
*Cleaverly v. Brooke.*  
Winchester  
Sum. Ass. 1772,  
Coram Justice  
Ashurst.

In an action against an executor, the case was cited on a bill filed for a legacy; it was said to have ruled at the Rolls, that *payment by executor of interest on a legacy* was sufficient proof of assets.

7. In this action the defendant having offered to pay a sum of money in discharge of the debt, is often offered as proof of the admission of the debt, but it is not conclusive; for it was ruled by Lord Mansfield in this case, which was by an inn-keeper for an election bill, that if a lesser sum was offered on account of a debt due, and in part of a bill, that it was good evidence; but if it was offered as a compromise it was no evidence at all, and ought not to be received, for a man may wish to buy peace at any rate: and if the offer be made to settle disputes, it ought not to be heard, as otherwise it would be impossible to enter into any treaty for accommodation at all. Gunn v. M'Calloch.  
Sitt. Trin. 1755.  
MSS.

8. "It is a general rule, that the husband or wife shall not be admitted an evidence for or against each other."

And therefore in an action for wages earned by the wife, Chief Justice Lee refused to let the wife's confession of a receipt of 20l. be given in evidence. Hill v. Hill.  
2 Stra. 1094.

So where in an action for goods sold and delivered, brought by the plaintiff as a *feme sole*, the defendant brought the husband to prove that she was a married woman; he was admitted by Justice Buller, and the plaintiff nonsuited: but the nonsuit was set aside on the ground of the impolicy of permitting the husband or wife to be witnesses for or against each other. Bentley v. Cook.  
Trin. 24 G. 3.

"But to this there are some exceptions."

1st. "Where the husband was not concerned in the action, but the evidence was collateral to discharge the defendant by charging the husband."

As in an action against the defendant for his wife's wedding clothes; the defence was, that the goods were furnished on the credit of the wife's father, and the mother was called to prove it, and allowed to give evidence to that effect, though it charged her husband. Williams v. Johnson  
1 Stra. 504.

2dly. So where the action was for nursing the defendant's child; the Chief Justice admitted the wife of the defendant's declarations of her agreement to pay four shillings a week, as evidence to charge her husband: this being a matter usually transacted by women. Anon.  
1 Stra. 527.

3. In actions upon policies of insurance, as to what shall be proof of interest and of the loss, it has been decided.

In

Pitcher v. Redshaw.  
Guldh. Sitt.  
Trin. 1772.  
MSS.

In *assumpsit* on a policy of insurance to prove the bill of lading, the consignee was called, who swore *that he received part of the cargo under that bill of lading*, and that was holden to be sufficient without proving the captain's hand: then to prove the nature of the loss, the captain's protest was offered in evidence, and it was objected to, as the captain himself should have been called, or his deposition had on a commission. *De Grey, Ch. Justice*, held, that the protest was not sufficient evidence, without some parol evidence how the loss happened, particularly here where the loss happened in port, when there might be a variety of persons who saw it besides the sailors who might be gone abroad. The master's protest is evidence of every thing against himself, but not how any particular loss happened.

"But *strong presumption*, if the best evidence that can be had, shall be admissible and good."

Green v. Brown.  
2 Stra. 1199.

As in *assumpsit* on a policy of assurance. Proof that the ship has never been heard of will be good to prove a total loss.

10. "In other cases the best evidence to be had must always be given." And therefore in declaring on a note of hand, or bill of exchange, or such contract in writing, *the note, bill, or contract, must itself be produced in evidence*, except the original be lost; in which case a copy "is good evidence."

Goodcirc v. Lake.  
1 Atk. 446.

But where an original note has been lost and a copy is tendered in evidence, sufficient probability must be shewn to the court to satisfy them as well of the loss as that the original note was genuine, before plaintiff will be allowed to read it.

Per Holt.  
Mic. 10 Geo. 2.  
1 Lord Raym.  
731.

So if a man destroys a thing intended to be evidence against him, a small matter will supply it: as where the defendant tore his own note of hand, a sworn copy was admitted as good evidence.

Gould v. Jones.  
1 Black Rep.  
384.

In this case in an issue out of Chancery to prove the hand-writing of a person whose name was subscribed to a declaration of trust, the evidence of a person who had corresponded with him, though he had never seen him write, was admitted, and held good.

Willis v.  
Singer.  
Taunton Lent  
Ass. 1785. MSS.

But in this case, which was debt on a bond, and to prove payment, the defendant's counsel produced a receipt, with the name of the person who it was said was used to receive money and do business for the plaintiff; but his hand-writing was only proved by a witness, who had received

ceived letters from him but had never seen him write; it was contended on the authority of the above case, that such evidence was sufficient; but Justice Buller said, that *was only because the writer lived abroad, and so that persons who had seen him write were out of the reach of a subpoena*; he therefore rejected the evidence, and the plaintiff had a verdict.

11. "The sentence of foreign courts of justice are conclusive evidence here of all matters of which they have cognizance."

As where the action was to recover a loss on an insurance *Barzillay v. Lewis* of a ship from *Liverpool* to *Amsterdam*, warranted *Dutch* property; in evidence it was proved that the vessel in her voyage to *Amsterdam* had been captured and carried into *St. Maloes*, where she was condemned as lawful prize, as an *English* ship. The court of *K. B.* were unanimously of opinion, that this sentence legally pronounced by a court of admiralty of *France* having jurisdiction of such questions, should be decisive of the question as to the neutrality: and the defendant (the insurer) had judgment. *Trin. 22 G. 3. Park Ins. 410.*

"Neither will the court here examine into the grounds of the condemnation made by the foreign court, nor question its legality (*Saloucci v. Woodmasts*, *Hil. 24 Geo. 3.*) unless the grounds of the sentence appear on the face of it, and they manifestly contradict the conclusion the foreign courts have drawn, or are unjust, and contrary to the law of nations."

As where the action was on a policy on the ship *Thetis*, *Saloucci v. Johnson* a *Tuscan* ship, warranted *neutral* property. It was found by the jury that the ship and goods were neutral, that she had been captured by a *Spanish* privateer and condemned, 1st. For refusing to be searched, and firing on the *Spaniard*: 2dly. For not having a charter party on board. The captain had answered these two grounds, 1st. By stating that he refused to be searched, and fired on the *Spanish* ship, she having hailed her under false colours: 2dly. That having taken in goods *by the piece*, that no charter party was necessary. The court held that there were sufficient grounds to shew the condemnation not to have been legal, and that therefore it should not conclude the insured. *Trin. 25 G. 3. Park Ins. 415.*

I now proceed to the pleadings and evidence on the part of the defendant.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "The plea should always answer to the promise or undertaking as laid in the declaration."

Skinner v. Row.  
2 Stra. 919.

Therefore in *assumpsit* by the assignees of a bankrupt, the defendant pleaded that the cause of action did not arise to the bankrupt within six years; on demurrer it was held ill, for the plea does not answer to the promise laid, which is to the assignee, and it precludes the plaintiff from proving any promise made to himself, if issue was joined on that plea.

Woodward v. Robinson.  
2 Stra. 302.

"So the plea must answer to every part of the declaration."

Weeks v. Peach.  
Salk. 179.

For if the plea be pleaded to the whole promise, and is an answer but to a part, the whole plea is nought, and the plaintiff should demur. But when it is pleaded to and answers but to a part, it is a discontinuance. As in *assumpsit* on three several promises, and the plea only goes to two of them, it is a discontinuance as to the third, and if it be a record of the same term, the plaintiff may have judgment by *nihil dicit* for so much as is uncovered by the plea.

Lamplough v. Braithwaite.  
Hob. 105.

2. "Where the promise is to arise from any consideration, to be performed; when it is performed, the defendant cannot traverse the consideration alone or *by itself*, for it is then incorporated and coupled with the promise: but where it is executory, the plaintiff cannot bring his action till the consideration is performed; and if the plaintiff brings his action before the consideration is performed, the defendant should traverse the performance and not the promise, for they are distinct in fact."

Cro. Jac. 483.

"So the defendant cannot plead in bar, that he revoked and countermanded his promise."

Howe v. Beech.  
3 Lev. 244.  
In Cam. Scac.  
Winter v. Foweracres.  
2 Roll. Rep. 39.  
S. P.

For where the plaintiff declared that in consideration that he would solicit and conclude a certain business for the defendant which he had with J. S. that he would pay, &c. but before that he had concluded it, that the defendant had countermanded him after he had had great pains and trouble: it was adjudged, that he should recover in *assumpsit* the whole sum promised, and not to be confined to a *quantum meruit* for what he had done.

3. "Mat-

3. " *Matters of law* that do not go to the gist of the action, but to the discharge of it, *must be pleaded*: such as accord and satisfaction, the statute of limitations, &c."

1. *Accord and satisfaction* is a good plea in *assumpsit*: but it must be performed at the time of the plea.

In *assumpsit* the defendant pleaded an accord between Shepherd v. him and the plaintiff, to do several matters, in bar of the demand, and averred the performance of part, and that he had tendered the performance of the remainder. On demurrer, the plea was held to be ill, for accord should only be pleaded when executed; for then only it is a satisfaction. Lewis. Sir J. Jones 6.

"For a bare accord without satisfaction is no plea."

Therefore where the defendant pleaded "that his several creditors, one of whom was the plaintiff, had come to an agreement to accept a composition in lieu of their respective debts from him, to be paid within a reasonable time, which he tendered and was ready to pay." This was held on demurrer to be no plea to this action for the whole demand: for it was a mere accord without satisfaction, an agreement unexecuted, and being without consideration, was *nudum pactum*, and so could not bind the party. But *per Just. Buller*, if the defendant had assigned over all his effects to a trustee for his creditors in order to pay them all *pro rata*, it had been a good bar. Heathcote v. Crookshanks. 2 Term Rep. 24.

2. *Payment* is a good plea under this head of satisfaction: it was in this case demurred to, as amounting to the general issue, but the demurrer was over-ruled: for it admits a good cause of action though discharged by a subsequent transaction. Vanhatten v. Morse. 4 Ld. Raym. 787.

So is *payment of a lesser sum before the time*; but this must always be pleaded, for it is not a performance which destroys the being of a promise, but a collateral agreement that supplies the place of it. But such evidence may be given in mitigation of damages. Abbot v. Chapman. 2 Lev. 81.

"And wherever accord and satisfaction is pleaded, it must appear to the court to be a reasonable and good satisfaction, and be accepted by the plaintiff as such, such as a better security." And so 1 Stra. 426.

A *bond* may be pleaded in bar of a *simple contract debt*. Roades v. Barnes.

2. "The *statute of limitations* is the next plea in bar I shall consider. And this must always be pleaded, and cannot be given in evidence on the general issue: for the plea of non-*assumpsit* speaks of a time past, and re- 1 Burr. 9. Anon. Salk. 278. Draper v. Glasop. 1 Ld. Raym. 147.

"lates to the time of making the promise, but the statute refers to the time of pleading."

This plea is founded on statute 21 Jac. 1. c. 16. which enacts, "that all actions of *assumpsit* must be brought within *six years* from the cause of action accrued."

I shall, first, enquire against what demands it runs. 2dly. What shall prevent it from attaching. 3dly. How it is to be pleaded.

### 1. *Against what Demands it runs.*

1. "The statute of limitations runs against every demand so as to be a complete bar notwithstanding any mesne acts intervening, as the *bankruptcy*, *coverture*, &c. of the parties."

Gray v.  
Mendez.  
1 Stra. 556.

For where in *assumpsit* by the assignees of a bankrupt and plea of *non-assumpsit infra sex annos*, the plaintiff replied, that six years were not elapsed at the time of the assignment. On demurrer the defendant had judgment: for though the six years might not have elapsed at the time of the assignment, yet as they were elapsed at the time of bringing the action, the statute was a good bar; for the time of limitation continued to run notwithstanding the bankruptcy and all mesne acts whatever; and it would be to defeat the statute as to all simple contracts, if an assignment at the end of five years and a half was to set all at large again.

Renew v.  
A&on.  
Carth. 3.  
Cheevely v.  
Bond.  
Show. 340.  
Oliver v.  
Thomas.  
3 Lev. 367.

2. The statute of limitations runs also against bills of exchange and promissory notes; which must be sued for within six years, or the holder will be barred.

3. The statute is a good plea in bar to an action by an attorney for his fees, though insisted in this case that such demand was out of the statute, as the fees arose on a suit which was matter of record.

4. "In the statute is an exception of accounts current between merchants, against which the statute shall not run. That clause is fully explained by this case."

Cotes v. Harris  
& alt.  
Sitt. G. Hall.  
Trin. 29 & 30  
G. 2.

The defendants were executors of the executor of W. W. and to this action of *assumpsit* pleaded *non assumpsit infra sex annos*. The plaintiff replied, that he had sued out a bill of *Middlesex* on the 3d of June, 1755, 28 Geo. 2. and that the testator in his lifetime had promised to pay the demand within six years before the time of suing out the writ.



## ASSUMPSIT.

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Writ. The *assumpsit* was founded on a bill, and the first *Wage v.*  
*item* of it was in 1746; and all the *items*, except the last, *Wyburn.*  
 were above six years standing before the bill of *Middlesex, Tr. 19 G. 3.*  
 sued out: It was contended for the plaintiffs, that this be- *B. R.*  
 ing an account current, and the last *item* within the time *Buller N. P.*  
 of limitation, that this should draw the former *items* out of *149.*  
 the statute. But it was ruled by Just. *Dennison*, that the  
 clause in the statute about merchants accounts extended  
 only to cases where there were mutual accounts and reci-  
 procal demands between two persons; not to cases be-  
 tween a tradesman and his customers, for those are not  
 merchants accounts: and he was therefore clearly of opi-  
 nion, that the statute was a complete bar to every part of  
 the demand of above six years standing.

5. "In the same statute is a saving of the right of in-  
 "fants, *feme coverts*, *non compos*, *persons imprisoned or beyond*  
 "seas. So that the statute does not run against any de-  
 "mand that they may have against others, provided they  
 "bring their actions within six years after their disabili-  
 "ties removed."

1. But though the rights of infants are so saved, yet *Chandler v.*  
 may infants at any time, during their minority, bring their *Vilett.*  
 actions by their guardians, and recover any demands due *2 Saund. 120.*  
 to themselves.

2. So in the cases of persons beyond sea, their rights *Rochtschilt v.*  
 are saved. To *non assumpsit infra sex annos* pleaded on a bill *Leibman.*  
 of exchange by the defendant, the plaintiff replied, that *2 Stra. 836.*  
 he had been beyond sea till such a time when he brought  
 his action, and this was held good. The principal point in  
 this case was, whether this clause in the statute extended  
 to actions of *assumpsit*, it being contended that it was con-  
 fined to actions for words: but that was over-ruled.

"But this clause in the statute only extends to persons  
 "who are *actually beyond seas*."

For where to *non assumpsit infra sex annos*, the plaintiff *King v.*  
 replied, That when the cause of action accrued he was re- *Walker.*  
 sident in foreign parts out of the kingdom of *England*, viz. *1 Black. Rep. 286.*  
 at *Glasgow in Scotland*, and therefore could not bring his  
 action sooner. This replication was held ill on demur-  
 rer, for the exemption did not extend to him, as *Scotland*  
 was not a foreign part within the meaning of the statute,  
 the express words of which are *beyond the seas*.

Therefore a foreigner or person resident abroad shall *Strithorst v.*  
 never be barred from bringing his action, from any length *Grime.*  
 of time while out of the kingdom; for the statute does not *3 Will. 1.*  
 begin.

begin to run till he has come into it; though any of the persons who are under the disabilities mentioned in the statute, may nevertheless during the time such disabilities exist, bring their actions.

*The plaintiff* was therefore never barred in his action by reason of his own absence from the kingdom; but as it often happened that *the defendant was out of the kingdom*, and though he could not be sued, yet the time ran to bar any demand against him: it was therefore enacted by stat. 4 & 5 Ann. c. 16. "That where any persons against whom there is cause of action shall be beyond sea at the time of such cause of action given or accrued, fallen or come, that the persons who shall have such cause of action shall have liberty to bring their action against them within such times as are limited for bringing the said action by stat. 21 Jac. 1. c. 16. after their return."

Cawer v.  
James.  
Tr. 15 G. 2.  
C. B.  
Buller N. P.  
150.

6. In the case of *executors*. If the six years be not elapsed at the time of the testator's death, if *the executor takes out proper process within the year*, it will save the bar by reason of the limitation, even though the six years within which the demand accrued be elapsed before process sued out. And this by the equity of the 4th section of stat. 21 Jac. which gives a year to commence a new action, in case the first judgment has been arrested or reversed.

Wilcocks v.  
Huggins.  
2 Stra. 907.  
Fitzgib. 81.

So if the executor brings an action, but dies before judgment and the six years run, *his executor may notwithstanding bring his action; but he must bring it within one year after the death of his testator*, unless he has been delayed by suits for the administration, or such like cause.

Smith Exec. of  
Cod v. Hill  
Exec. of Clark.  
1 Will. 154.

It should seem that if an executor is out of the kingdom, that the clause of the statute extends to him: but in all cases, if the plaintiff has been in the kingdom when the cause of action accrued, from that time the statute begins to run even though he then departs from it: so that if he, (or if he dies) his executor or administrator, does not bring the action within six years from the time of the cause of action first accrued, the statute is a complete bar.

7. "In all cases where money is to be recovered back where it has been paid by mistake, or for a consideration which has happened to fail, the statute of limitations begins to run from the time the money was so paid, for

" for from that time the right to recover it back accrued."

As where the defendant was administrator to his uncle, *Bree v. Holbech*.  
*W. H.* and found among his papers a mortgage deed for *Dougl. 630.*  
 1200*l.* which he assigned for that sum to the plaintiff, it  
 was afterwards discovered that this deed was a forgery;  
 but *that it was unknown to the defendant at the time he made*  
*the assignment.* This action was brought to recover back  
 1200*l.* so paid, to which the defendant pleaded the statute  
 of limitations, he having received the money from the  
 plaintiff six years before; and it was held to be a good bar,  
 though contended that the statute should only begin to run  
 from the time the fraud was discovered, which was within  
 six years. But it was held, that if any fraud appeared in  
 the defendant, as if he knew when he made the assignment  
 that the deed was a forgery, that it might take the case  
 out of the statute.

But where money of a person who had died intestate *Cary v. Steven-*  
 had been received by the defendant before administration *son.*  
 was granted to any one, it was held that the statute should *2 Salk. 421.*  
 not begin to run from the time of receiving the money,  
*for then no one had a title to receive it: but it should begin*  
*from the time of the administration granted.*

## 2. What shall prevent the statute from attaching.

1. "The first is a *promise by the defendant to pay the debt* *Bland v.*  
*" after the six years have elapsed; for this is a revival of* *Hafelrig.*  
*" the assumpsit, and no new consideration is required: for* *2 Vent. 151.*  
*" the plea admits a cause of action before six years.*

As in *assumpsit* on a promissory note, and *non assumpsit* *Yea, Bart. v.*  
*infra sex annos* pleaded: on the trial it appeared, that the *Mic. I G. 3.*  
 defendant was surety in the note for *J. S.* and that six *B. R.*  
 years were elapsed since the note was given; but that *Buller N. P.*  
 upon demand within the six years, the defendant said, *149.*  
 "You know I had not any of the money myself, but I am  
 willing to pay half of it." The court were of opinion,  
 that this promise took it out of the statute.

"And a *conditional promise* to pay will take the demand  
 "out of the statute, as much as an express one."

In *indebitatus assumpsit* for goods, and *non assumpsit infra* *Heyling v.*  
*sex annos* pleaded, the plaintiff gave in evidence, that the *Hudkins.*  
 goods were sold above six years ago; and that the de- *Salk. 29.*  
 fendant being requested to pay, denied that he had bought  
 the goods; but further said, "Prove it and I will pay  
 you." This promise, though conditional, was held to take  
 the

the demand out of the statute; for the defendant by such promise waived the benefit of the statute as much as by an express promise.

“ But the promise must be a promise to pay.”

Owen v.  
Woolley.  
At Salop, 1757.  
Buller N. P.  
148.

For where in an action by an executor for money had and received to the use of the testatrix, and *non assumpsit infra sex annos* pleaded: the evidence proved that the defendant said, “ I acknowledge the receipt of the money, but the testatrix gave it to me.” Mr. Baron Clive directed the jury to find for the defendant: for such an acknowledgment could not amount to a promise to pay, when the defendant insisted that he had a right to *retain* the money as a gift.

Bland v.  
Hafelrig.  
2 Vent. 150.

It was held in this case, That where several are bound jointly and severally in a note or other undertaking, if a *joint* action is brought against all, and they plead the statute of limitations, proof of a *promise by one within six years* will not support the action, even against him who made the promise. But this case seems now not to be law on the authority of the case of *Whitcomb v. Whiting*: for there, in *assumpsit* on a joint and several promissory note, in the action which was against one only, payment of interest by another of the drawers, was held a sufficient acknowledgment to take it out of the statute as to all, and the plaintiff recovered accordingly.

Whitcomb v.  
Whiting.  
Doug. 629.

Yea v. Fouraker.  
2 Burr. 1099.  
Per Lord Mansfield.  
Cowp. 548.

2. “ But a *promise* is not necessary to take a demand out of the statute; for the slightest *acknowledgment* of the debt has been held sufficient, as to say “ Prove your debt and I will pay you,” or “ I am ready to account, but nothing is due to you.”

“ And what is an acknowledgment of the debt, is matter to be left to the jury.”

Loyd v. Maund  
2 Term Rep.  
760.

For where the defendant, on the action being commenced, wrote a letter to the plaintiff's attorney in very ambiguous terms, neither expressly admitting nor denying the debt; the plea was the statute of limitations, and the plaintiff relied on the letter as an acknowledgment, the judge being of opinion, that it did not amount to an acknowledgment, nonsuited the plaintiff: but ~~on~~ a motion for a new trial it was held, That it should have been left to the jury whether it amounted to an acknowledgment or not.

3. “ The next mode by which the statute is prevented from becoming a bar, is by *having sued out process* out of  
“ some

"some court before the six years elapsed, and having proceeded on it."

1. A *latitat* sued out within six years shall be good to prevent the statute from running, though no bill of *Middlesex* preceding it is shewn. So a *capias* is good without an original.

Hollister v. Coulson.  
1 Stra. 550.  
Metcalf v. Burrowes.  
Buller N. P. 151.

2. "So though the writ sued out has been an informal one, it shall yet be sufficient." As where an attachment of privilege was sued out against an attorney, but was informal, from the circumstance of being made returnable on a general return: it was however held sufficient to prevent the demand from being barred by the statute: for the clause in the statute which permits the plaintiff to bring a new action within a year, where the first judgment has been reversed, allows for informality, since it takes notice of suits stayed for irregularity.

Leadbeater v. Markland.  
2 Black. Rep. 1131.

"But though irregular or informal process may thus prevent the statute from attaching, yet process which is impossible or a nullity, shall not take a demand out of the statute."

For where to a plea of *non assumpsit infra sex annos*, the plaintiff replied a bill of *Middlesex* tested *die Lune prox. post tres septimanas*, &c. and returnable the same day, whereupon was returned *non est inventus*, and shewed the continuances, and relied on this as process to prevent the statute's attaching on the demand; but on demurrer the defendant had judgment, for there cannot be such a bill of *Middlesex* as this is returnable the very day of the teste; and the plea of the statute of limitations is to be favoured.

Green v. Rivett.  
2 Salk. 421.

3. So if the plaintiff has levied a plaint in *assumpsit* in an inferior court, it shall prevent the statute of limitations from running against him, if he avers in his declaration above that it is for the same cause of action.

Story v. Atkyns.  
2 Stra. 719.

And if an action has been so commenced in an inferior court, and the defendant removes it by *habeas corpus* to the King's Bench; though the six years have elapsed before the removal, yet the statute does not bar the action, if the commencement of it in the court below was within the time.

Gawer v. James.  
Trin. 14 G. 2.  
C. B.  
Buller N. P. 151.

4. If the plaintiff files his bill in Chancery, and pending the suit there, the statute of limitations runs against his demand, and his bill is afterwards dismissed as a matter properly cognizable at law; in such case the court will interfere and save his right, by not suffering the statute to be pleaded in bar of it; though in this case it is said, that a bill

Anon.  
1 Vern. 173.

Anon.  
2 Atk. 1.  
1 Atk. 282.

bill depending in Chancery for six years is not sufficient to take a debt out of the statute of limitations *ideo quere.*

Anon.  
2 Chan. Cal.  
217.

But if a plaintiff has been delayed by the defendant himself as by injunction staying proceedings, till after the six years have run, in such case the plaintiff shall not be barred.

Lacon v.  
Lacon.  
2 Atk. 395.

5. But it is necessary that a suit should be continued: for though a writ has been sued out, yet if there have been *no proceedings on it*, the statute shall run against the demand.

Budd v.  
Berkenhead.  
2 Salk. 420.

Therefore wherever to *non assumpsit infra sex annos* the plaintiff replies a writ sued out within the six years, he must also shew *the continuances* in the suit; and a *taliter processum*, &c. is not sufficient.

“ And the continuances must be by regular process.”

Smith v. Bower.  
3 Term. Rep.  
662.

For where to a plea of the statute of limitations the plaintiff replied, That he had sued out a bill of *Middlesex* in *Mich.* Term 1785, which had been regularly continued to *Mich.* 1789, when he *sued out an attachment of privilege* for the same cause of action to which the defendant appeared: to this there was a demurrer, when it was decided, That to keep the suit alive there must be a continuance of the original writ sued out; that here the first process was by bill of *Middlesex*, of which an *attachment of privilege* (being a writ of a different nature) could not be a continuance; and the defendant had judgment.

Finch v. Wil-  
son.  
1 Will. 167.

So the continuances must be pleaded *where the cause has been commenced by latitat or common clausum fregit*: but where the plaintiff replied to the plea of the statute of limitations, an attachment of privilege sued out against the defendant (being an attorney) on a certain day within the six years, it was held, that the continuances need not be shewn; for an attachment of privilege in *C. B.* is in the nature of an *original writ*, in which no continuances are required to be shewn, but merely the teste.

Whitehead v.  
Buckland.  
Style 373.  
401.

6. “ If a bill of *Middlesex* or *latitat* has been sued out in the vacation, it by fiction of law always bears teste as of the last day of the preceding term; it might therefore happen, that though a demand was really barred in point of time, yet by the reference to the last day of the preceding term, the process might seem to precede the time when the debt was in fact barred, and so take it out of the statute.”

It was therefore decided in this case, That where to a plea of the statute of limitations the plaintiff replied a writ sued out and tested of the last day of the preceding Michaelmas term, at which time the demand was not barred; that the defendant should not be bound by this artificial reference to the last day of term, but might rejoin and give in evidence *the true time* when the process was sued out, so as to enable the statute to attach on the demand.

Wherever therefore the plaintiff endeavours to take advantage of this reference, the defendant should rejoin; and in his rejoinder shew the *true time when the writ was sued out*.

Johnson & alt.  
Assignees of  
Hargrave v.  
Smith.  
2 Burr. 950.

Lambert v.  
Whiteby.  
Pasch. 1760.  
B. R.  
Buller N. P.  
151.

If the defendant pleads *non assumpsit infra sex annos ante diem impetrationis brevis*, and the plaintiff reply *quod assumpsit infra sex annos*, viz. such a day, the plaintiff is not obliged to prove the taking out the original, because there is a particular day mentioned in the replication: but if no particular day be mentioned, the plaintiff must prove the taking out of the original.

Osman v.  
Bowley.  
Hill. 12 G. 2.  
Per Eyre.  
Buller N. P.  
149.

But there seems little foundation for that distinction; for though a particular day be named in the replication, yet the plaintiff is not bound to prove a promise on that day: and the manner of pleading to avoid the necessity of proving the original at the trial seems to be mistaken: for in such case the plaintiff should reply, that he sued forth the writ on such a day, and that the defendant promised within six years of that day, and conclude with an averment: and then the defendant is at liberty to take issue in his rejoinder, either on the time of the writ being sued out or on the promise being made within six years of the time mentioned, they being alledged as distinct facts in the replication; and when the defendant takes issue on one of these facts, he admits the other to be true, and so it need not be proved.

Buller ibid.

And where to a plea of the statute of limitations the plaintiff replies a bill of *Middlesex* sued out on a day certain, and the defendant rejoins that he did not promise at any time within six years next before the suing out any precept called a bill of *Middlesex*, the plaintiff cannot give parol evidence of the time of suing out the writ only, but he must produce the writ itself, for the writ stated in the replication is not admitted, but the issue is joined, that the defendant did not sue out any writ.

Burnell v.  
Braund.  
G. Hall Sitt.  
Trin. 1772.  
MSS.

8. " By *sect.* 4. of stat. 21 *Jac.* 1. c. 6. if the judgment " has been arrested or reversed for error, or the defendant " has been outlawed, and the six years expire, the plaintiff " may bring a new action, provided he does it within one " year after such judgment has been arrested, &c. or the " outlawry has been reversed."

### 3. *How the Statute is to be pleaded.*

" Where the cause of action is to arise from an *executory consideration*, as some act to be performed and a promise " to pay in consequence of it, there *non assumpsit infra sex annos* is not the proper plea; for the *assumpsit* does not " arise till the consideration is performed, which may be " long after the promise made: it should be *actio non accrevit infra sex annos*."

Gould v.  
Johnson.  
2 Salk. 422.

As in *assumpsit* the plaintiff declared that, in consideration that he, at the request of the defendant, would admit *A.* and *B.* as guests to diet them, that the defendant promised to pay so much, and avers that he did so admit them: the defendant pleaded *non assumpsit infra sex annos*, and on demurrer it was held to be a bad plea: for it was not material when the promise was made, if the cause of action was within six years, from which time only the statute begins to run, and the dieting might be long after.

" This is the case of *assumpsit* generally; where the action is *indebitatus assumpsit* it is different, as this last is for " a subsisting debt."

Collins v. Bun-  
ning.  
Caf. K. B.  
444.

For where to such an action of *indebitatus assumpsit* founded on a promise to pay on demand, the defendant pleaded *non assumpsit infra sex annos*, and the plaintiff demurred for cause, that the plea should be " that there was " no demand within six years," or " *non assumpsit* within " six years after demand:" but the court held the plea good: " for an *indebitatus assumpsit* shews a debt due at the " time of the promise made, and so the plea is good. But it had been otherwise had the duty arisen from a collateral matter.

Powell v.  
Pierce,  
Mich. 4 G. 1.  
Buller N. P.  
151.

Hopkins v.  
Dewar.  
Hill. 32 G. 2.  
C. B.  
Bull. N. P. 152.

4. Another plea in this action is *bankruptcy in the plaintiff*: for if pleaded, it is a sufficient bar to the action if the defendant; or if proved at the trial, that the plaintiff was a bankrupt at the time of the work or labour done, will be sufficient to nonsuit him.

" But this is a good plea only where the action is for " debt due to the bankrupt *before his bankruptcy*, for he may " maintain an action for what he earns after his bankruptcy."



For where to *assumpsit* for business done as an attorney, Chippendale v. the defendant pleaded that the plaintiff was a bankrupt, Thomlinson. and the commission in full force, the plaintiff replied that *the business was done after the assignment, and for the necessary support of himself and his family*; to this was a rejoinder that the plaintiff had not obtained his certificate, and a demurrer. Trin. 25 G. 2. The court were of opinion, that though the assignees might seize the bankrupt's future effects, yet that no other person could say that he had not a property in his own earnings, that the assignees could not contract for the bankrupt's labour, nor let him out, and therefore they overruled the demurrer. B. R. Cooke B. L. 459.

"But if the defendant pleads bankruptcy in the plaintiff, he must also plead the commission and *assignment*."

For where he pleaded only that the plaintiff was a bankrupt, and so all his goods, &c. belonged to the commissioners, the plaintiff demurred and had judgment; for till the assignment the property of the goods is not taken out of the bankrupt. Cary v. Crisp. Salk. 108.

2. "So that the defendant was a bankrupt and had obtained his certificate, is a good plea to discharge all debts due before his bankruptcy."

1. But it is a bar to such debts only as could be proved under his commission.

Therefore where the plaintiff had joined the defendant Paul v. Jones. in giving a warrant of attorney to confess a judgment as a security for money payable at a future day as a surety, the defendant became a bankrupt before the plaintiff had paid any money on account of the security, though it had been demanded of him before the defendant's bankruptcy; it was adjudged, that though a party is liable for another by a contract prior to the bankruptcy, yet if he has not actually paid the money before the commission, he cannot prove it under the commission, and so he is not barred by the certificate. 1 Term Rep. 599.

So where the case was, that the plaintiff having become bail for the defendant, a judgment was obtained against him on the bail bond in Michaelmas Term 1763, on which he brought a writ of error; in March 1764, the defendant became a bankrupt: in Trinity Term 1764, the writ of error was non-prossed, and in January 1765, he paid the money to the plaintiff in the action, and in May 1765, the bankrupt obtained his certificate. To an action brought the bankrupt pleaded his certificate, which was held to be no bar; for as the plaintiff had not paid the money till long after Goddard v. Vanderheyden. 3 Will. 262. 2 Black. Rep. 764.

after the bankruptcy, he could not swear that it was a debt due at the time of the bankruptcy, and so could not prove it under the commission, and therefore it was not barred by the certificate.

"But where the debt could have been proved under the commission, the certificate shall be a bar to the action."

Brooks v. Lloyd.  
1 Term Rep. 17.  
Martin v. Court.  
2 Term Rep.  
640. S. P.

Therefore where the plaintiff had joined the defendant as surety in a bond payable by installments, and *after default in the first installment* the defendant became a bankrupt; it was held that as this could not have been proved by stat. 7 Geo. 1. c. 31. under the bankrupt commission, that it should be discharged by his certificate, which therefore was a bar to the action.

2. "But though by his certificate a bankrupt is discharged from all debts due at the time of the commission sued out, yet he may make himself liable for a debt due before his bankruptcy, by a new promise before his certificate obtained."

Trueman v.  
Fenton.  
Cowp. 544.

As in this case, where the bankrupt was indebted in two notes to the plaintiff, who did not prove them under the commission, and on cancelling them the bankrupt gave him a note for little more than half their amount; this was held to be a good debt, and recoverable after the bankrupt had obtained his certificate.

Cockshot v.  
Bennet.  
2 Term Rep.  
765. ante 5.

But had the note been given as a consideration to induce the plaintiff to sign the defendant's certificate, it had been void under stat. 5 Geo. 2. or if it had been obtained by coercion, it had been in like manner void.

Wickes v. Strahan.  
2 Stra. 1157.

4. A certificate under a joint commission shall discharge a separate debt; for separate debts may be proved under a joint commission by a Chancellor's order on petition.

5. "By stat. 5 Geo. 2. c. 30. The effects of a bankrupt against whom a second commission has issued, are always liable to his debts, except on the second commission he has paid fifteen shillings in the pound; therefore in such case the certificate is no bar."

Thornton v.  
Dallas.  
Douglas 46.

And though the *first commission had been superseded by consent of the creditors*, they having received a composition yet in the case of a second bankruptcy, the bankrupt must pay fifteen shillings in the pound: for the statute has the words in it, "*compounded their debts.*"

These are cases in which the bankruptcy has happened at the time of the action brought, and the certificate been obtained.

1. But where the cause of action was before the bankruptcy, and the action commenced during the bankruptcy, but the certificate not obtained till after the judgment, so that it could not be pleaded, the bankrupt shall be discharged by application to a judge. Graham v. Benton. 1 Willf. 41.

2. Where the party becomes bankrupt after the action commenced, he may plead the bankruptcy *puis darrein continuance*, which must be received if verified by affidavit; but in such case it is not sufficient to say, "that on such a day he became a bankrupt;" but he should add, "that he had conformed to the statutes concerning bankrupts," or it is bad. Paris v. Salkeld. 1 Willf. 137, 139.

*Note.* When a bankrupt is sued, it is usual to apply by motion to the court to discharge him on common bail, which on a proper affidavit, is done or refused according to the circumstances; as in this case. 2 Willf. 41.

5. The next plea I shall consider is that of a *Tender*.

"Wherever the defendant admits the money is due to the plaintiff, it must be pleaded in the form of a tender."

For where to *assumpsit* for money had and received, &c. the defendant pleaded *non assumpsit* to the whole of the plaintiff's demand, except ten guineas; and as to that said, *that he was ready and had always been ready to pay the same*; this on demurrer was adjudged to be a bad plea: for whether defendant was always ready to pay or not, is not issuable; it should have been pleaded as a tender. French v. Watson. 2 Willf. 74.

1. Where the agreement is to pay at a certain time a tender at that time, and always ready, is a good plea; but where the money is due and payable immediately by the agreement, the party must plead *tout temps prêt* from the time of the promise: and therefore in such case *this plea is bad after an imparlance*, for by that it appears that the defendant was not always ready. Giles v. Hart. Salk. 622.

But a tender may be pleaded after an imparlance by leave of the court, under particular circumstances: as where the writ was returnable in *Easter* term, and the declaration not delivered till the day before the *Essoign* day of *Trinity* term, and Bailey v. Holdstone. Trin. 16 & 17 Geo. 2.

Buller N. P.  
156.

and the defendant lived in *Shropshire*, so that the agent could not get instructions in time.

Sweatland v.  
Squire.  
2 Salk. 623.

2. Where the action is *indebitatus assumpsit* if the defendant pleads a tender, it must be with a *tout temps prist* generally; for where it was that he was *tout temps prist* after the tender, it was held ill on demurrer: for it is not enough that he was always ready after the tender, for the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action; and therefore the plaintiff should have judgment for the time which was unanswered.

Johnson v. Lancaster.  
1 Stra. 576.

3. It was adjudged on demurrer, that a tender was pleadable to a *quantum meruit*.

Ferrand v.  
Pearson.  
Pasch. 2 Geo. 1.  
C. B.  
Buller N. P.  
156.

4. Where there is no certain time in the promise for payment of the money, the defendant is to be always ready, and when he pleads *semper paratus*, the plaintiff must in his replication shew a special request and refusal, if there be any, for the request laid in the declaration is not material nor traversable.

Lancashire v.  
Killingworth.  
2 Salk. 623.

5. Where a time and place is fixed for payment, if the parties meet, he that pleads a tender must also plead a refusal, or such plea will be bad on demurrer, though good after a verdict; but if one be absent, the other must shew that he was at the time and place, and made the tender; in which case he must shew at what time of the day he was there, and how long he staid; for he ought to shew that he has done all that could be done to accomplish what by his agreement he was bound to do. 5 Co. 114. Yelv. 38. Cra Jac. 13.

And in such case, the last part of the day is the time by law appointed for a tender, unless the circumstances of the case point out another time, as payment on the transfer of stock, which must be from ten to twelve.

Clemens v.  
Reynolds.  
Sayer Rep. 18.

A tender, and that he has been always ready since the death of the intestate, is a bad plea by the administrator: it should be that his intestate was at all times during his life from the making of the promise ready to pay, and that he has been always ready since his intestate's death.

Under the head of a tender falls the case of *payment of money into court*.

Pether v. Shelton.  
1 Stra. 638.

1. For wherever the defendant pleads a tender, *he may always pay the money into court* he admits to be due; so without

without that, it is no plea, and the plaintiff may sign judgment.

2. If the defendant pays money into court, but does not afterwards pay the plaintiff *his costs* up to that time, the plaintiff may go on with his action. Hand v. Lady Dinely. 2 Stra. 1220.

3. If after money paid into court, the plaintiff proceeds in his action, it is at his own peril: for if he does not prove more due than is so paid into court, he shall be nonsuited, and the defendant have his costs; for a tender and refusal discharges costs. 3 Black. Com. 304. Anon. 1 Vent. 21.

*As to what shall be a good Tender.*—It is settled,

1. That if the defendant proves a tender in *bags* it is sufficient, for it is the receiver's business to tell it: but if the defendant says, "here, I am ready to pay you," and yet holds the bags all the time under his arm, it is no good tender. Wade's case, 5 Co. 114. 4 Ref.

2. A tender in foreign money made current by proclamation, is a good tender. S. C. 2 Ref.

*And Note.* That the defendant cannot plead *non assumpsit* to all the counts and a tender beside. Dowgall v. Bowman. 3 Will. 145.

6. Another plea in this action is that of *Infancy*.

Though this may be also given in evidence of the general issue of *non assumpsit*, for the *promise of an infant is absolutely void*. Darby v. Boucher. Salk. 279.

"The general rule in the case of infants is, that they are liable on no contracts, *except for necessities*, as meat, drink, education, clothes, &c."

1. But necessities for an *infant's wife* are necessities for himself, and he shall be liable; but if furnished in order for the marriage, he is not liable: for she was not then his wife, nor the goods furnished on his credit. Turner v. Frisby. 1 Stra. 163.

2. So if one under age contracts for the nursing of his child, it shall be deemed a lawful contract, and he shall be liable. Bac. Max. 18 Max.

3. "So whatever is for the *benefit of an infant's estate*, he shall be liable to in this action."

Evelyn v. Chichester.  
3 Burr. 1717.

As where a copyhold estate descended to an infant and a reasonable fine was assessed, it was adjudged, that *indebitatus assumpsit* lay against the infant for that fine when he attained his full age, he having enjoyed it during the time of his infancy. And Justice Yates was of opinion, that it would lie during his infancy, though debt would not. 1 *Ld. Raymond*, 30.

Kirton v. Eliott.  
2 Bull. 69.

So if a lease be made to an infant, and he occupies and enjoys under such lease, he is chargeable for the rent incurred during the time he continues in possession.

Earle v. Peele.  
Salk. 386.

4. But though an infant is liable on his contract for necessaries, yet if one lends money to an infant, even to pay for necessaries, the infant is not liable; for it may be misapplied, and therefore the law will not trust him with the expenditure; but it is at the peril of the lender, who must lay it out for him, for then in fact it is providing him with necessaries: besides, the *assumpsit* is founded on the lending, not on the application.

Ellis v. Ellis.  
Cas. K. B. 197.

So that if the plaintiff proved that the money was lent to pay for necessaries, and applied to that purpose, he might be entitled to a verdict: but in such case the defendant should rejoin and take issue on the expenditure.

“And therefore in such case, where infancy is pleaded, “that the goods were necessaries,” is the only proper replication.”

Clowes v. Brook.  
2 Stra. 1101.

For where in *assumpsit* on a farrier's bill and infancy pleaded, the plaintiff replied, that it was for necessaries for the infant's horses: on demurrer, the replication was held to be bad: for non constat, that the horses were necessaries for the infant. The replication should have been generally, “that they were necessaries,” and then have left it to evidence, if the things furnished were not necessaries, from the circumstances of the defendant's health and fortune.

5. “Goods furnished to an infant in the way of his trade, are not necessaries, and therefore he is not liable; for the law will not allow him to trade, which may ruin him.”

Whittingham v. Hill.  
Cro. Jac. 494.

In *assumpsit* for goods sold and delivered, the defendant pleaded infancy, replication that they were *pro necessario victu & apparatu ad manutentionem familiae suae*. The defendant rejoined, that he was a mercer at *Shrewsbury*, and bought these wares to sell again, and traversed that they were *pro necessario*, &c. demurrer thereupon: and per curiam,

*curiam*, this buying for the maintenance of his trade, though he gains thereby his living, shall not bind him, for an infant shall not be bound by his bargain for any thing but necessaries, as meat, drink, or learning.

And this was so ruled by *Chief Justice Lee* in this case, *Whywall v. Champion*, which was an action for tobacco, sent to the defendant, who was an infant and kept a shop in the country; which the court held would not lie against an infant, whom the law would not suffer to trade. *2 Stra. 1083.*

Though in another case before Mr. Baron *Clarke*, wherein the defendant gave nonage in evidence, it appeared that he had set up a farm, and bought the sheep from the plaintiff to stock it: the judge charged the jury to find for the plaintiff; and said he thought the law should not put it into the power of infants so to impose on the rest of the world. *Bull. N. P. 154.*

“ And so much are the contracts of infants deemed void for any thing but for necessaries.”

That if an infant contracts debts for articles not necessaries, and dies, and his executor promises to pay, yet it shall not bind the estate: for the contract on which the promise was founded being void, the promise shall be deemed so too. *Stone v. Withy-pool. Cro. Eliz. 126.*

“ But where an infant is *sub potestate parentis*, and living in the house with his parents, he shall not then be liable even for necessaries.”

Therefore where the action was for caps, and other ornamental apparel; it being proved, that the defendant was an infant, and lived all the time with her mother; it was ruled by the court, that under these circumstances the infant could not bind herself even for necessaries; for that what was fit and proper for infants under such circumstances was to be left to the direction of their parents, and allowing such contracts would be to encourage extravagance. *Bainbridge v. Pickering. 2 Black. Rep. 1325.*

6. “ But though an infant is thus exempt from all demands, except for necessaries, yet if goods, *not necessaries*, have been delivered to an infant, and, *after his coming of age*, he promises to pay for them, he thereby ratifies the contract, and shall be bound to pay. And what amounts to such confirmation shall be matter to be left to the jury.” *Southernton v. Whitlock. 1 Stra. 690.*

" But where an infant so binds himself by a new promise, he shall not be bound farther than the promise extends."

Green v.  
Parker.  
Abingdon Sum.  
Aff. 1756. MSS.

For where under a plea of the general issue infancy was given in evidence by the defendant, the plaintiff's counsel then gave evidence of *a promise after he came of age, to pay half-a-crown in the pound*; it was ruled by Justice Foster, that this new promise should bind him to pay to the extent of it, but no further.

Borthwick v.  
Carrothers.  
1 Term Rep.  
648.

And where to a plea of infancy the plaintiff replies, that the defendant had ratified his promise after coming of age, and the defendant rejoins that he had not so ratified his promise after full age, upon which issue is joined. It is sufficient for the plaintiff to prove the promise; and the proof *that the defendant was not then of full age lies upon the defendant*, though the assertion that he was of full age makes part of the plaintiff's replication; for whether of age or not, is a matter which lies within the defendant's own knowledge, and not within the plaintiff's.

Jekyll v. Pater-  
son.  
Sitt. Hill. 25  
G. 3. MSS.

But where there was a plea of infancy, and at the trial the counsel for the defendant would have called his father to prove his nonage at the time of the contract: the court refused to admit him, for he was named *guardian on the record*, and so was liable to the costs of the action.

" But where the plaintiff relies on a new promise made after full age, the infant must always be charged on the *simple contract*."

Capper v. Davenant.  
Trin. 29. Car. 2.  
B. R.  
Bull. N. P. 155.

For where an infant bought *a chariot and horses*, and gave a *single bond* for the money, and after, at full age promised to pay, this matter being specially found, the court was of opinion that the contract was so extinguished by the bond, that it did not remain to be a consideration for his promise at full age, and so they gave judgment for the defendant.

Ayliff v. Archdall.  
Cro. Eliz. 290.

But if the things furnished *were necessaries*, an infant may bind himself by *bond*, but it must be in a bond to the exact amount and value of the necessaries furnished; for where it was *with a penalty*, it was adjudged to be void, but that a *single bond* had been good.

Ruffell v. Lee.  
1 Lev. 87.

And so where an infant gave a *single bill* for payment of necessaries, it was held good against the infant.

7. " But though an undertaking or promise is made to an infant, in consideration of *such infant's promise*, though  
" this



"this is void; yet, if the promise is for the infant's benefit, he may maintain an action on it."

As in this case, which was that of mutual promises to marry, and one of the parties was an infant, the infant recovered damages for breach of the promise of marriage. Holt v. Wood. 2 Stra. 973.

7. In *assumpsit* under the statute for use and occupation of an house, by permission of the plaintiff; *nil habuit in tenementis* is a bad plea. For the action is founded on the promises, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant enjoyed by permission of the plaintiff, it is sufficient. For it is not necessary for the plaintiff to say, that it was his house, any more than in *assumpsit* for goods it is necessary to say that they were his goods. But the plea would be good at common law, for there an interest is supposed to pass from the lessor. Lewis v. Willis. 1 Will. 314.

8. "A judgment for a defendant in one personal action, is a good bar to another personal action for the same cause, and is therefore a good plea, (6 Co. 7.) But the cause of action must be specially stated to be the same."

As where the defendant being a creditor to a bankrupt, had signed judgment on a bond of the bankrupt's on the 9th of March, and sued out a writ of *fi. fa.* thereon, under which the sheriff levied the money: on the 9th of April the commission was sued out, and in Michaelmas Term following, the assignees brought trover for the goods so taken under the execution, and had a verdict against them. They afterwards brought *assumpsit* for the money arising from the sale of the same goods; the defendant having pleaded the former recovery in trover, it was held to be ill, for want of the proper averments to support the plea, viz. that the question or cause of action was the same. Afterwards the parties going to trial on other issues, the special matter was found, though further that the bankrupt had committed an act of bankruptcy before the 9th of March, viz. in the February preceding: But the court held clearly that the assignees having failed in the action of trover, could not recover in *assumpsit* for the price of the same goods. And the test when one action shall be a bar to another is, when the same evidence is required in both actions, as was the case in this. Kitchen v. Campbell. 2 Black. Rep. 779. S. C. 240.

9. "That the money for which the action is brought has been attached in the defendant's hands, by foreign attachment, Willes v. Needham. 1 Lord Raym. 180.

"*attachment*, is a good plea : so it may be given in evidence  
"on the general issue." Vid. plen. Action of Debt. chap. 2.

Palmer v.  
Hooke.  
1 Ld. Raym.  
727.

But if the defendant pleads such foreign attachment at the suit of *J. S.* or gives it in evidence, he should prove *that the plaintiff was indebted to J. S.* for otherwise it might be a collusion between *J. S.* and the defendant to defraud the plaintiff. But the plaintiff is at liberty to shew that the suit in *London* for the attachment was commenced after an original filed by the plaintiff against the defendant, for that would avoid the operation of the foreign attachment, the suit being actually commenced in the courts above, when the attachment took place.

Savage's case.  
Salk. 291.

As where in *assumpsit* on a note of hand given by the defendant to the plaintiff, and *non-assumpsit* pleaded, the plaintiff proved the note in evidence : the defendant in discharge of himself produced the record of a foreign attachment, whereby the said debt was attached by city process for satisfaction of a debt demanded there of the plaintiff, and was there condemned : it was ruled by *Trevor, Ch. Just.* that this was a good discharge ; but that if the plaintiff could have shewn the original wherein he declared to have preceded the attachment, so that it would have appeared that *this court was in possession of the action to recover the debt before it was attached*, that in that case the plaintiff should recover, notwithstanding the attachment.

Brook v. Smith.  
Salk. 280.

And in this case as to how it may be pleaded, and how given in evidence on the general issue, it was ruled, that if the *attachment and condemnation be before the writ purchased*, that it may be given in evidence on the general issue, because there is an alteration of the property before the action brought ; but if the *attachment only be before the writ purchased, but not the condemnation*, it ought to be pleaded in abatement of the writ ; but if the *condemnation be after the action commenced, and before the plea pleaded*, it may then be pleaded in bar, but shall not be given in evidence on the general issue, for that the property is not altered until condemnation.

Openheimer v.  
Levy.  
2 Stra. 1082.

10. "*Alienage* in the plaintiff is a good plea in abatement, but it must be, that he is an *alien enemy* ; for alien friends may maintain personal actions, and it shall not be presumed that he was an enemy."

11. "*A discharge under the insolvent debtors act* is a good plea."

But

But in such case the defendant should shew that he was a person within the benefit of the act, and that the charge was in every respect regular and pursuant to the statute. *Turner v. Beale. Salk. 521.*

12. "A release is also a good plea in this action."

And a promise before it is broken may be released by parol, but after it has been broken it cannot be discharged without deed, by any new agreement, without satisfaction. "For till there is a duty or demand, there is nothing whereon the release can operate." *May v. King. Case K. B. 538.*

Therefore where to an action on a bill of exchange, against the drawer, he pleaded a release after the bill drawn, but before the acceptance; it was adjudged bad. For the release was before the defendant was chargeable, the acceptor being first liable. *Drage v. Netter. 1 Ld. Raym. 65.*

13. Where an action is brought by an administrator, it is a good plea "that the intestate was resident within a different diocese when he died; for simple contract debts are personal, and the administration must be committed of them where the party dies. And if a man has two houses in different dioceses, and lives mostly at one, but goes occasionally to the other, where he happens to die, administration shall be granted by the bishop of the diocese where he died; for he was commorant there, and not merely as a traveller." *Hilliard v. Cox. Salk. 37.*

14. It would be a good plea for the defendant that all matters in difference between him and the plaintiff had been referred to arbitration, and an award made thereon; but where the defendant does so plead, and the words of the reference are of all matters in dispute; yet the plaintiff is not precluded thereby, but may give in evidence that the subject matter of the present action was not before the arbitrators, nor decided on by them. *Raveev. Farmer. 4 Term Rep. 146.*

15. The last plea I shall consider is, that of the general issue, which is *non assumpsit*. Though where the defendant pleaded *not guilty*, it was held to be good after a verdict, though if the plaintiff had demurred, it had been bad. *Marshall v. Gibbs. 2 Stra. 1022. Elrington v. Doham. 1 Lev. 142.*

Under this issue the defendant may go into equitable defence: He may prove a release without pleading it, and take advantage of every equitable allowance possible. *Per Lord Mansfield. 2 Burr. 1010.*

So in *assumpsit* for money had and received, the defendant may, under the general issue pleaded, give in evidence *Dale v. Sollet. 4 Burr. 2133.*

a *retainer* of so much money in his hands due to him by the plaintiff, without pleading or giving notice of it as a set-off; for the plaintiff can only recover what in equity and conscience is due, which is what remains due after all fair deductions.

Hatton v.  
Morse.  
Salk. 394.

2. So he can give *payment* in evidence on the general issue, or he may plead it. For as there is no debt, there shall be presumed to be no promise.

Lord Bernard v.  
Saul.  
1 Stra. 198.

3. So under the general issue he can give an usurious contract in evidence: for the statute having declared all such *contracts as absolutely void*, there can be no *assumpsit*.

Ante 161.

4. So infancy may be given in evidence on the general issue. 2 Lev. 144.

Gordon v.  
Austin.  
4 Term Rep.  
611.

5. In an action on a promissory note against three persons, two of whom were stated to be outlawed, and the last pleaded *non assumpsit*, the declaration misnamed one of the parties, whose name was on the note; it was adjudged, that at the trial, the defendant who had pleaded might avail himself of this variance, between the instrument declared on and that offered in evidence.

2 Stra. 733.

6. And in general whatever defeats the promise is good evidence on *non assumpsit*: as where a seaman had sued in the admiralty court for his wages, and had judgment against him there, and afterwards brought *assumpsit* at law; the first sentence was held to be conclusive evidence against him.

McLellan v.  
Howard.  
4 Term Rep.  
175.

7. As the defendant may plead double under the statute, it must be observed that he cannot plead *inconsistent pleas*, as *non assumpsit* to the whole declaration, and a *tender* to a part; for if the *non assumpsit* be found for him, it is that nothing is due, whereas the *tender* admits something to be due.

#### 4thly, OF THE VERDICT, THE JUDGMENT, AND WRIT OF ENQUIRY.

##### 1. OF THE VERDICT.

Hannay v.  
Smith, & etc.  
3 Term Rep.  
661.

1. Where there are two or more defendants, and one suffers judgment to go by default, and the others go on to trial; the plaintiff cannot be nonsuited as to these, though  
he

he cannot prove his case, but the defendant must have a verdict.

2. "The verdict should follow the issue. For if the plaintiff declares that the defendant assumed to do divers things, and the jury find that he assumed to do only a part, the plaintiff hath failed in his case."

As where the plaintiff declared, that in consideration of, &c. the defendant undertook and assumed to give him 13*l*. a field of hemp, and other matters; and the jury find that the defendant only promised to give him 13*l*. The defendant had judgment. Simms v. Westcott. Cro. Eliz. 147.

So if the plaintiff declares on an absolute promise, and the jury find a conditional one, the plaintiff shall not have judgment: for the promise in the first case is entire, and if the plaintiff fails in proving part, he fails in the whole. And in the latter case, the promise found is not that on which the plaintiff grounded his action. Mustard v. Hopcott. Eliz. 149.

"But where the ground of the action is not upon an entire contract, but merely in damages, there the finding of the jury may vary. For it is a rule in this action that the plaintiff may recover less than he goes for, but not more." 5 Burr. 906.

Therefore in an action on a policy of insurance, where the plaintiff declared for a total loss, he was allowed to recover for a partial one only. Gardiner v. Croisdale, 2 Burr. 904. 2 Black Rep. 198. S. C.

So in an action on a promissory note given for different considerations, the defendant may go into evidence of part of the considerations not being performed, and so that part of the note is not due, or that part has been paid, and the plaintiff may recover the remainder. Per Lord Kenyon. Young v. Milner. West. Sitt. Hill. 31 Geo. 3.

So the jury may give less damages than are proved. As on a promise to pay for an horse a farthing a nail, doubling each time, which would amount to an immense sum. Boldero v. Andrews. 26 Car. 2. per Hales Bull. N. P. 156.

## 2. OF THE JUDGMENT AND WRIT OF INQUIRY.

When the jury find a verdict they then settle the quantum of the damages. But where there is judgment by default, or on demurrer, or any other interlocutory judgment, then the plaintiff's right to some damages is determined, but the express sum is to be settled in damages by the intervention of a jury on a writ of inquiry, which goes to the sheriff, who returns them when found to the court, upon which the plaintiff obtains final judgment.

As

As to which these points have been settled.

- East India Com- 1. In an action on an agreement for goods at a sale, and  
pany v. judgment by default, the defendant shall not on a writ of  
Glover. inquiry be allowed *to go into evidence of fraud on the sale*; for  
1 Stra. 612. by suffering judgment to go by default, he admits the agree-  
ment as set out by the plaintiff, and the writ of inquiry  
is only to settle the quantum of the damages.
- Snowden v. 2. If the action has been on a promissory note, the note  
Thomas. in executing the writ of inquiry ought to be proved.  
2 Black. Rep. Though circumstances may vary this rule, as here where  
748. the defendant's attorney offered to admit the whole, if exe-  
3 Will. 155. cution was stayed.  
S. C. & contra.
- Bevis v. Lind- But in proving the note, it is not necessary to be done  
fell. by the subscribing witness, but it may be done by proving  
2 Stra. 1149. the party's hand. For the note being set out in the de-  
claration, is admitted, and the only use of producing it, is  
to see whether any money is indorsed on it as received.
- Green v. Hearne. It was however in this case resolved, that where a judg-  
3 Term Rep. ment by default was on a bill of exchange, that it was suf-  
303. ficient to produce it without proving it, for that the  
amount was admitted, and the only reason for producing  
it was to see if any part had been paid.
- Andrews v. But in cases of promissory notes and bills of exchange  
Blake. in which the defendant lets judgment go by default, the  
H. Blackst. present practice is to refer them to the master to ascertain  
529—541. the amount of note and interest, without the intervention  
Shepherd v. of a writ of inquiry. And this in both courts of K. B.  
Charter. and C. B.  
4 Term Rep. 273.
- Auriol v. If an indorsed bill of exchange is not paid when due, the  
Thomas. indorsee in an action against the indorser is after a protest  
2 Term Rep. 52. not barely intitled to legal interest, but shall also have all  
the incident expences, as exchange, &c. if such charges are  
reasonable.
- Blancy v. 3. If on a judgment by default and writ of inquiry, the  
Hendrick. plaintiff proves an account stated, and a balance then  
3 Will. 205. due to the plaintiff, the jury should *give interest* for the  
sum so settled, *from the time of its being so liquidated to*  
*the bringing of the action.* And *per Cur.* in this case,  
where a note is due, it bears interest from that time; where  
money is lent, it bears interest from the time it becomes  
payable; but for money due for goods sold, no interest  
is allowed.
- Stead v. Late- 4. There must be the same notice of executing a *scire*  
ward. 1 Stra. *feri* inquiry as a common writ of inquiry.  
622.

And

And the notice should accurately describe the place where it is to be executed, for in this case the notice having omitted to describe the sign of the house where it was to be executed, and also that it was to be executed between two certain hours, it was for that reason set aside. Arnold v. Squire. Sayer Rep. 181.

5. In this case the plaintiff, after obtaining an interlocutory judgment and the issuing of the writ of inquiry, became a bankrupt; but before the writ was executed; notwithstanding which it was executed in his name; it was moved to set this aside, on the ground that by the bankruptcy the property vested in the assignees, who should have sued out a *scire facias*, and the writ of inquiry have been executed in their names: but the court held it to be good. Bibbins v. Mantel. 2 Willf. 358.

6. Judgment on a writ of inquiry was set aside; it appearing that the under-sheriff, who had returned the jury, was attorney for the plaintiff in the action. Baylis v. Lucas. Cowp. 112.

7. Where the defendant is a foreigner, it is not necessary that the jury, on a writ of inquiry, should be that *per me-dictatem lingue*. Nedham v. Corfellis. Cro. Eliz. 293.

8. Where part of the jury, on a writ of inquiry, was composed of persons then in prison for debt, it was held a sufficient reason to set aside the execution of a writ of inquiry. Stainton v. Beadle. 4 Term Rep. 472.

And note as to costs—That where the defendant pleads a tender, which is found against him, that under statute 43 Eliz. 6. If the damages are under forty shillings, the judge may certify and deprive the plaintiff of his costs. Bartlett v. Robins. 2 Willf. 258.

And in this case the court ordered costs for not going on to execute a writ of inquiry, as they do for not going on to trial. Shadford v. Houston. 1 Stra. 317.

## CHAPTER II.

## The Action of Debt.

**D**EBT is an action founded upon an *express contract*, in which the certainty of the sum or duty appears, and in which the plaintiff is to recover the sum he goes for in *numero*, and not in damages.

This action I shall consider, 1st, With reference to the contract. 2dly, With reference to the person. 3dly, The pleadings. 4thly, The evidence. 5thly, The verdict and judgment.

## I. DEBT CONSIDERED WITH REFERENCE TO THE CONTRACT.

- 1st. This is on simple contracts.
- 2d. On special contracts under seal, as bond and leases.
- 3d. On matters of record, as judgments, statutes, and recognizances.

## I. OF DEBT ON SIMPLE CONTRACTS.

Slade's case.  
4 Co. 94.

Debt lies upon all simple contracts, wherein there is a commutation of property for money. As for the price of goods sold, wherein the price has been ascertained between the parties: but for such causes this action is now seldom brought: first, because the wager of law is allowed: 2dly, Because it was held, That the plaintiff must recover the *exact* sum declared for, or he could not have judgment, which being often uncertain, it has given way to the action of *assumpsit*.

But as this action may still be brought for simple contracts, it may be improper to take notice of some cases in which *debt will not lie*.

Pinchon's case.  
9 Co. 87.

And 1. *Debt on simple contract* will not lie against an *executor or administrator*; the proper remedy is an action on the case



case. For the testator might have waged his law, which the executor or administrator cannot do. *Morgan v. Green.* Cro. Car. 187.

2. If a man retains an attorney to conduct a suit for him, the attorney may have debt for his fees: but if one promises an attorney to pay him, if he acts for another person, debt will not lie; for there was no *quid pro quo* whereon to found a contract: the action should be on the promises; and besides, that the attorney has a remedy against the party for whom he acted. *Sands v. Trevillian.* Cro. Car. 107—193. Per Lord Holt. 2 L. Raym. 482.

3. Debt will not lie against the acceptor of a bill of exchange, for notwithstanding the acceptance, the drawer still is liable; so that it is not the actual debt of the acceptor, but he is rather in the nature of a security: but it lies against the drawer himself, for he was really a debtor by the receipt of the money. *Hard's Case.* Salk. 23.

#### 1. OF DEBT ON SPECIAL CONTRACTS.

These are, 1st, On Bonds. 2dly, For Rent.

#### 1. OF DEBT ON BONDS.

I shall first consider what bonds are good in law: and, secondly, what are void.

"Bonds good in law are such as are entered into by parties able to contract voluntarily, and for a consideration, which is according to law."

1st. A bond must be by parties able to contract.

1. Therefore bonds made by infants under 21 years, are void. Litt. § 239.

And such is likewise the case of *femes covert*.

But there is an exception, that infants may bind themselves to pay for meat, drink, apparel, or other necessaries, and it will be good in law. Co. Litt. 176.

But it must be in an obligation for the very sum necessary for the purposes: for an obligation, with a penalty, conditioning to pay for necessaries, is void. *Ayliffe v. Archdall.* Co. Eliz. 946.

2. So every deed which any man *non compos* makes, is void. *Beverley's case.* 4 Co. 123.

But 1 Res.

Yates v. Boen.  
2 Stra. 1104.

But modern resolutions seem to consider it as absolutely void; for the defendant to debt on a bond may plead *non est factum*, and give lunacy in evidence.

In all these cases of infants, feme covert, or persons insane from the weakness, want, or imbecility of judgment, or want of power, their contracts are deemed void in law.

## 2d. Bonds must be entered into voluntarily.

Whelpdale's  
case.  
5 Co. 119.  
2 Res.

1. It is essential to a bond that it is entered into *voluntarily*, for if *obtained by duress* the bond is voidable by the obligor: but as the bond on the face of it appears to be good, the obligor must avoid the bond by *pleading* to it *duress*; for the court must decide by the verdict of a jury, if it was obtained by duress or not.

“ And these cases have been deemed duress sufficient to avoid a bond.”

Wooden v.  
Collins.  
Mic. 9 G. 2.  
Buller N. P.  
172.

If given by the defendant when *under an arrest made without any cause of action*; or if the arrest was for a just debt, but made *without good authority*: or if the arrest was made by a warrant from a justice of peace on a *charge of felony*, when *no felony was in fact committed*; or if a felony was committed, yet if *the arrest was unlawfully made*, it is duress: and bonds entered into by persons in custody under those circumstances, are avoidable in law.

“ And it is the same in a court of equity.”

Nicholls v.  
Nicholls.  
Atk. 409.

For though a man is arrested by due course of law, yet if a wrong use be made of it, as compelling him to execute deeds not before thought of, a court of equity will consider it as duress, and relieve him.

Sumner v.  
Ferryman.  
2 Stra. 917.

But duress of goods will not be sufficient to avoid a bond, though held otherwise in 1 Roll. Ab. 687.

“ So duress shall only avoid the bond as to the obligor himself.”

Huscomb v.  
Standing.  
Cro. Jac. 187.

Therefore it was held no discharge to the surety, who had joined in the bond, and against whom there had been no duress practised.

Bac. R:g. 22.

2. If a man menace me except I make him a bond for 40*l.* and I tell him I will not do it, but will give a bond for 20*l.* the court will not expound this bond to be a voluntary one.

one: for *non videtur consensum retinuisse, qui ex præscripto minantis aliquid mutavit.*

3dly, Bonds must be for a consideration which is according to law.

That involves the consideration of, What bonds are void? For such are void whose consideration is not legal.

These are, first, such as are void in their creation; or 2d, Co.Litt. 206. b. Such as are void by matter subsequent.

Bonds void in law at their creation are such whose consideration is, *malum prohibitum*, or founded on express prohibitory statutes; as simony, usury, &c. 2dly, Whose consideration is *Malum in se*. 3dly, Which are contrary to the good policy of the state, as in restraint of trade, *ex. gr.* and are founded on the common law.

1. "Bonds whose consideration is *malum prohibitum*," are 1st, Bonds whose consideration is a usurious contract or agreement. 2dly, Bonds given for money won at play. 3dly, Bonds given for the sale of offices. 4thly, Bonds given for a simoniacal consideration.

# 1. Of Bonds whose consideration is Usurious.

1. By statute 12 *Ann. c. 16. sect. 1.* It is enacted, "That no person shall upon any contract take for the loan of any monies, wares, &c. above the value of 5*l.* for the forbearance of 100*l.* for one year. And all bonds and assurances for payment of money, whereon shall be reserved or taken interest above 5*l. per cent.* shall be void."

But where the first bond or security is entered into *bona fide*, and the interest legally reserved, a subsequent agreement reserving more than legal interest on the first contract, shall not avoid it; though the last agreement is void under the statute. Pollard v. Scoly. Cro. Eliz. 20.

So where on an issue out of chancery, the case was, the plaintiff was a malt factor, and had supplied the bank with malt at different times, for which he usually drew three months, and on the 28th of Jan. 1787, the bank was indebted to the plaintiff 1125*l.*: the plaintiff then demanded payment; and on the bankrupt's asking for time, insisted that 150*l.* should be added to the debt, or he would have Gray v. Fowler. Aff. of Purser. H. Blackst. 462.

have nothing to do with interest; these made together 125*l.* and for the aggregate sum the bankrupt gave him five acceptances payable within fourteen months. After this transaction the plaintiff gave him further credit to the amount of 59*l.* The two first acceptances were paid, amounting to 44*l.* In the month of October 1787, all dealings between them ceased, and the plaintiff then insisting on a better security for the whole which was due to him, he agreed to take an assignment of some leasehold premises, and in that deed the sum then due as the balance was secured, and interest at 5*l. per cent.* Two questions arose on this: 1st, Whether the reserving the sum of 150*l.* did not vitiolate the debt then due? 2dly, Whether the debt for goods sold, was not extinguished by taking a deed to secure it? But it was resolved, that the debts for the goods still subsisted unimpeached by the subsequent usurious transaction, and unextinguished by taking the security by the deed, though it was agreed that the notes were void.

**Winch v. Fenn.** But where in an action for usury, and it was proved to be the custom to discount bills in London for persons in the country, and that on such discount they had charged the usual discount of interest of 5*l. per cent.* and five shillings *per cent.* on the gross sum, as commission to answer the extra expences of clerks, &c. kept for this business: this was adjudged not to be usury.

3 Co. 69. b. 2. "Several evasions have been attempted of this statute, but the courts have uniformly supported its spirit: "for however disguised the agreement might be, if in fact "it was usurious, it has been held to be void."

**Lowe v. Waller.** As 1. Where the lender of money compelled the borrower to take goods at a price considerably above their value in the form of a sale; and afterwards had them repurchased at a lower price, whereby he reserved to himself a greater profit than 5*l. per cent.*; it was adjudged to be usurious.

**Patterson's case.** So where the defendant sold to the plaintiff goods of the value of 20*l.* and it was agreed that the plaintiff should pay for them within six months 34*l.* this was held to be usurious.

**Floyer v. Edwards.** But however, where the plaintiff sold goods, viz. gold, to the defendant, to be paid for in three months; but if not then paid, that the defendant should pay one half-penny per ounce for every month after, though this exceeded 5*l. per cent.* yet it being proved to be the usage of the trade, it was on that ground held to be not usurious, though

Cowp. 112.

though if it had not been a *bona fide* sale, but merely colourable to cover a loan, it had been otherwise.

So where illegal interest was reserved in the form of rent for an house, it was held to be usury.

Bedo v.  
Saunderson.  
Cro. Jac. 440.

2. "If by any possibility above legal interest *can be received* in money, and that appears on the face of the contract, it shall be deemed usury: for uncertainty of receiving does not prevent it from being so deemed an *usurious contract*."

As where the bond reserved 10*l.* for the forbearance of 20*l.* for one year, *if the son of A. was then alive*, though the life of the son of *A.* was uncertain, and so the interest might wholly be lost, yet as by his living, above legal interest was to be paid, it was held to be usury: And for a further reason, that if the uncertainty of life might be allowed as an evasion, the interest might be reserved on the contingency of *many lives*, which would amount to a certainty.

Button v.  
Downham.  
Cro. Eliz. 644.

Clayton's case.  
5 Co. 70.

"But a reservation whereby the lender of the money may eventually obtain more in value than 5*l. per cent.* but may also receive less, so that on the face of the instrument it does not appear that he is to obtain in money, a *certain advantage above 5*l. per cent.** shall not be deemed *usury*."

Therefore where in debt on a bond, the case was, that the plaintiff lent to the defendant 100*l.* (for which the bond was given) for four years *without interest*, but in consideration of which, the defendant agreed to find the plaintiff's daughter with meat and drink for that time, and also to take her into partnership with his wife, she paying a moiety of the charges, losses, &c. of the business, and receiving half the profits; and further, that the defendant was to board and lodge the plaintiff herself for 20*l. per ann.* The defendant pleaded that the consideration of the bond was *usurious*, for that the board and lodging of the plaintiff was worth more than 20*l.* and that that of the daughter was worth 10*l.*: The court, were clearly of opinion that this was not usury, for the defendant might receive so much from the skill, recommendation, and connections of the daughter as might be worth the consideration, and she might receive a loss which would overbalance the consideration, as she might be made a bankrupt in consequence of this trading.

Morrisett v.  
King. 2 Burr.  
891.

3. "For the rule is general, that where the principal is safe, and the interest only hazarded, if that is more than legal, the contract is *usurious*."

Sayer v. Glean.  
1 Lev. 5.  
1 Sid. 27. S. C.

N

"Therefore

Sharpley v.  
Hurrell.  
Cro. Jac. 208.  
1 Sid. 27.

"Therefore no contract shall be deemed usurious in which the lender runs the risk of losing his principal, however large the interest reserved may be." As in the case of lending on *bottomry* or at *respondentia*, in which case, though the interest reserved far exceeds what is legal, yet is the contract good.

I.d. Chesterfield  
& alt. Executors  
of John Spencer  
v. Sir Abraham  
Janfen.  
1 Will. 286.  
1 Atk. 304.  
S. C.

So where Mr. Spencer borrowed 5000*l.* of the defendant, for which he gave his bond for 10,000*l.* payable on the contingency of his surviving the Dutchess of Marlborough; though there was a great disparity of age, he being but thirty years of age and she seventy, so that the contingency of his dying first appeared so slender; yet it being proved that he was of a very bad constitution, it was, on a solemn hearing, adjudged a fair contingency; and though the sum reserved far exceeded legal interest, yet as the defendant ran the risk of losing both principal and interest, the agreement was adjudged not to be usurious.

Richards v.  
Brown.  
Cowp. 770.  
2 Rcs.

"But where the contingency upon which the defendant is to lose the money is so very slight, that it appears to be merely an evasion." As if it was on the contingency of a young and healthy person dying within three months, this shall be deemed usurious.

Per Just. Burnet  
1 Atk. 330.

"Upon this ground it is that the grant of an annuity at ever so great an under-price is not usury; because the principal is absolutely sunk and gone to the lender."

Tanfield v.  
Finch.  
Cro. Eliz. 27.

And though there be a certain value for such things, and the sum given much below it, it is not usury unless there is some secret contract to repay the principal.

Richards v.  
Brown.  
Cowp. 770.

So that in cases of loans in this form, the question turns upon, Whether there was a fair purchase of an annuity, or a real loan of money under the colour of an annuity? For if the substance of the agreement was for a loan, a slight colourable contingency shall not take the agreement out of the statute of usury, where above legal interest has been reserved.

Murray v.  
Harding.  
3 Will. 390.

But where the grant was in the form of an annuity, and there was a clause in the deed that the borrower might repay the sum given for the annuity at a future period, which would seem to make the sum advanced a loan and the annuity interest; yet the court held it not to be usury; for the repayment was casual and depended on the borrower (the grantor) himself, so that it was not in the lender's power to have his money at all events, so that as to him the principal was gone.

## 2. Of Bonds given for Money won at Play.

By stat. 9 *Ann. c. 14.* it is enacted, "That all notes, bills, bonds, judgments, mortgages, or other securities given by any person where the whole or any part of the consideration of such securities shall be for money or other valuable things won by gaming, or by betting on such as game, or for repaying any money knowingly lent for such gaming, or lent at the time and place of such play to any person who shall play or bet, shall be void. And where such securities shall affect lands, they shall enure to the uses of such persons as would be intitled to the lands in case the person incumbering the same had been dead and the security void."

## 3. Of Bonds given for Sale of Offices.

As to these it is enacted, by stat. 5 & 6 *Ed. 6. 16.* "That if any person bargain or sell any office or deputation, or any part of them, or receive money or profit, or take any promise or assurance for the same, which office shall in any wise touch or concern the administration or execution of justice, or the receipt, controulment, or payment of any of the King's treasure, rent, revenue, auditorships, or surveying manors or lands, or the King's customs, or any administration or necessary attendance in the custom-houses, or the keeping of any of the King's fortresses, or which shall concern any clerkship in any court of record wherein justice is to be administered, all such bargains, agreements, bonds, and assurances shall be void: But the act not to extend to any office whereof any person is seised of any estate of inheritance, nor to any office of partnership, or the keeping of any house, park, manor, garden, chace, or forest."

As where the plaintiff having procured for his brother (the defendant's testator) a place in the excise, by his interest with the commissioners, and the testator gave him a bond conditioning for the payment of 10*l.* a year during his life; he died, having omitted payment for some years before his death; and the plaintiff having put the bond in suit, equity relieved the defendant against it, as occasioning extortion, corruption, and the sale of offices.

*Law v. Law.*  
3 P. Wms. 391.

But it has been decided, that where an office is within the statute, and the salary certain, if the principal makes

*Culliford v. De Cardonell.*  
a de. Salk. 466.

Gedolphin v.  
Tudor.  
Salk. 468.

a *deputy*, reserving by bond a lesser sum out of the salary, it is good, or if the profits are uncertain, reserving a part (as half the profits) it is good; for the fees still belong to the principal in whose name they must be sued for. But where a person so appointed gives a bond to the principal to pay him a sum certain, without reference to the profits, this is void under the statute.

#### 4. Of Bonds whose Consideration is Simony.

As to this, it is enacted by stat. 31 *Eliz.* 6. "That if any persons, bodies politic or corporate, which shall have election, presentation, and nomination or voice, or assent in the election, &c. of any fellow, scholar, or other person to have place in any cathedral or collegiate churches, colleges, schools, hospitals, halls, or societies, shall take any money or other profit, or any promise or assurance to receive any money or other profit, either to themselves or their friends, the place of the person so offending shall be void."

By § 6. "If any person shall for any money or profit, or for any promise and assurance of money or profit admit, institute, install, and induct any person into any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, every such person shall forfeit the double value of the living, and the benefice be void."

Under this statute it has been decided,

Baker v. Rogers.  
Cro. Eliz. 788.

1. If the *church is void*, a bond given for the purchase of the presentation is clearly simony, and therefore void.

Winchcomb v.  
Bishop of Winchester.

Hob. 165.  
Barrett v. Glubb.  
2 Black. Rep.  
1052.

2. So if given for the next *presentation*, the incumbent being *in extremis*, it is simony.

But the purchase of the *advowson in fee*, the incumbent being on his death-bed, and in fact dying the next morning, is not simony: for an *advowson* is a temporal and valuable right, and so capable of sale, and not simony, particularly where it appeared that such was not known to the person presented.

3. And as to presentations during incumbency, it is enacted by stat. 12 *Ann. c.* 12. "That if any person shall for money or profit, in his name or that of any other, procure

"cure



"cure the next presentation to any living ecclesiastical,  
 "and shall be presented and collated thereon, every such  
 "presentation shall be void, and such agreement shall be  
 "deemed a simoniacal contract."

But to this are certain exceptions, which though founded  
 on decisions previous to the statute, still are law. 2 *Black.*  
*Com.* 280.

As, 1st. If a father purchases the next presentation of a *Smith v.*  
 living as a provision for his son, it is not simony, and this *Shelbourne.*  
 though the son was present at the making of the agree- *Cro. Eliz.* 685.  
 ment; for a father is bound to provide for his son.

2. Bonds given to pay money to charitable uses, or as in *Abigail Baker*  
 this case, that the person presented should pay 10*l.* yearly *v. Mountford.*  
 to the son of the late incumbent while at the university, *Noy.* 142.  
 on receiving the presentation, are not simoniacal, provided  
 the patron or his relations are not benefited: as it would be  
 if the 10*l.* had been reserved to the patron's son; for it is  
 essential to simony that the person presenting does it from  
 some corrupt motive of profit to himself.

"And in general where the condition of the bond is to  
 "enforce what it is the duty of the incumbent to do, such  
 "shall be deemed legal."

As where in debt on a bond against the defendant as *Bagshaw v.*  
 incumbent of *W. in Derbyshire*, the condition of the bond *Brody.*  
 was, that he should constantly and duly reside at the curacy- *4 Term Rep.*  
*house*, in and upon the curacy, or in default of such resi- *78.*  
 dence that he would resign within one month after request,  
 and that he would not commit or suffer any waste or dilapi-  
 dations on the house, lands, &c. during the time he should  
 continue curate. This condition was on demurrer adjudged  
 to be good and legal, as being for the purpose of securing  
 a performance of all those duties which by law he was  
 bound to discharge.

3. General bonds of resignation have been held to be le- *Peel v. Lord*  
 gal by many decisions, upon the presumption that they *Carlisle.*  
 might be to enforce some duty from the incumbent, which *2 Stra.* 228.  
 was not contrary to law, as to resign when the patron's son *Babbington v.*  
 came of age: but these bonds are now held to be illegal by *Wood.*  
 a modern decision: but *quære* if bonds to resign, as to pro- *Hutt. III.*  
 vide for a son, or in case of non-residence, if expressed in the *Fytche v. Bishop*  
 condition of the bond, are not still legal? *of London.*  
*In dom. Proc.*  
*May, 1783.*

For in this case, which was debt on a bond from the *Partidge v.*  
 defendant on his presentation to a living, conditioning *Whiston.*  
 to resign it when the patron's son was ordained and could *4 Term Rep.*  
 be 359.

be presented, and the defendant relied on the agreement being simoniacal: the court on demurrer gave judgment for the plaintiff.

2. Of Bonds void in Law, whose Consideration is malum in se. *Justin Instit. Lib. 3. tit. 20.*

Co. Litt. 206.b. 1. As if a man be bound in an obligation, the condition of which is, *that he shall kill J. S.* the bond is void.

Walker v. Perkins, Administ. 2. So where the defendant's intestate gave to the plaintiff a bond, the condition of which was, *that the plaintiff should live with him in a state of fornication*, and that he should leave her an annuity of 60l. a year; the bond was held to be illegal and void.  
3 Burr. 1568.  
1 Black. Rep. 517. S. C.

Turner v. Vaughan. 3 Will. 339. But if a man *debauches a woman before chaste*, or having seduced a woman before virtuous, gives her a bond as a recompense, or a provision for her future support, it is *premiun pudoris*, and good in law.

And the practice of courts of equity is to the same effect.

Marchioness of Annandale v. Harris. 2 P. Wms. 432. For if a common strumpet obtains a bond from an inexperienced person, equity will set it aside. But where a man *debauches a woman*, and gives her a bond, it is *premiun pudicitie*, and the injury a sufficient consideration. And where such a bond was given, and the obligor by deed agreed that the sum should be laid out in an annuity for the woman, the execution of the bond not being proved, the party failed at law, but equity relieved the woman to its extent from the recital in the deed.

3. "The last class of bonds void in law, are those which are not founded on any express prohibitory statute, but are against the common law, founded on the rule of law, *That contracts, which it is contrary to the good policy of the state to support, are void.*"

These are, 1st, Bonds given in restraint of trade. 2dly, Bonds given in restraint of marriage, and marriage brokerage bonds. 3dly, Bonds given for withholding evidence. 4thly, Bonds abridging persons of the rights or powers annexed to any office by law.

## 1. Of Bonds in Restraint of Trade.

1. "General bonds given *not to follow a trade*, are void."

But this is to be understood with some restrictions.

Bonds conditioning generally that the obligor shall not follow a trade, even if a consideration appears, are void; for it is for the public good that every one should follow the business he is fit for, and the courts never support such impolitic restrictions; but particular restraints (as not to follow a trade in such a street) may be good in law, in that case only *where a consideration appears*. But without such consideration they are void.

Mitchell v. Reynolds.  
1 P. Wms. 181.

Broad v. Jollyfe  
Cro. Jac. 739.

As where in consideration that the obligee took the obligor of the bond, and instructed her in the obligee's business, *without any fee*, the obligor covenanted in a penalty *not to follow that trade within half a mile of the obligee's then dwelling, or where she should after be*. This bond was held to be good, for it was only a particular restraint, and a consideration appeared, viz. instruction in the obligee's business without a fee.

Chefman v. Nainby.  
2 Stra. 739.

So if the condition of the bond is, that the defendant shall buy but a certain quantity of the articles he deals in, or only of certain persons, or at such and such times, the condition shall be deemed as a restraint of trade, and void in law.

Thompson v. Harvey.  
Show. 2.

2. "And so though the bond is not absolutely prohibitory of the obligor's following a trade, but *that if he does so within the place restrained, he shall pay a sum of money*, it is void. For its effect is in restraint of trade."

As where the condition of the bond was, that if the defendant's son should follow the business of an haberdasher within the county of Kent, or city of Rochester, or Canterbury, that he should pay to the plaintiff 20l. It was adjudged to be void, as a restraint of trade.

Colgate v. Batchelor.  
Cro. Eliz. 872.

## 2. Of Bonds in Restraint of Marriage, and Marriage Brokage Bonds.

1. "Bonds, whose conditions are *in restraint of marriage*, are void on the same principle of impolicy as those in restraint of trade."

As

Lowe v. Peers.  
4 Burr. 2225.

As where the defendant gave to the plaintiff a promise of marriage, under seal, in these words: "Hereby I promise Mrs. Catharine Lowe that I will not marry with any person beside herself; if I do, I agree to give her 1000*l*. N. Peers." The defendant having married another, was sued on this covenant, and the plaintiff had a verdict. But judgment was arrested; for it was not a covenant absolutely to marry, but to restrain the defendant from marrying any other person, though the plaintiff was not bound to marry him; and so being in restraint of marriage, was adjudged to be void.

Hall v. Potter.  
3 Lev. 411.

2. Bonds given to *procure a marriage with any person* are void. For in general all marriage brokerage bonds are void.

Turton v. Benson.  
1 Stra. 240.

3. Bonds given to *refund part of a marriage portion* are void, as fraudulent on the contracting parties.

Woodhouse v. Shipley.  
2 Atk. 535.

4. Bonds given to each other by a man and woman, under a penalty, to *marry after the death of the father* of one of the parties, are void. For it is a partial restraint, and fraud on the parent, and tends to encourage the disobedience of children.

Duke of Hamilton v. Lord Mohun.  
1 P. Wms. 118.

5. So where the plaintiff undertook by bond that in consideration of the defendant's giving his consent that his ward should marry the plaintiff, *that he would release all sums due by the defendant to his ward's estate*. This bond was deemed to be void.

*Note.* These cases are inserted here for the sake of uniformity, being the proper objects of relief in a court of equity; though according to the doctrine in 2 *Will.* 348, such illegal consideration might be pleaded to an action of debt on the bond.

### 3. Of Bonds given for the with-holding of Evidence.

Mason v. Wilkins.  
2 Vent. 109.

All such bonds are illegal and void.

Collins v. Biantern.  
2 Will. 344.

As where the defendant and others being indicted for perjury by one *Rudge*, the plaintiff gave his note to *Rudge* for a sum of money to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. *Rudge* did not prosecute; and the

the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose (the compounding the prosecution) and the bond given to secure and repay that, that the bond was illegal and void.

#### 4. Of Bonds abridging the Rights or Powers annexed to any Office by Law.

“Wherever by law particular powers or rights are annexed to any office, bonds limiting or abridging the exercise of those powers are void.”

As where the plaintiff, who was sheriff of *Hampshire*, on his appointing a person his under-sheriff, took a bond from him and the defendant as his surety, one condition of which was, “that the under-sheriff should not execute any extent, liberate, elegit, or other process of execution, for any sum above 20*l.* without first acquainting the plaintiff (the sheriff) with the same, and getting his special warrant for the execution.” To debt on this bond the defendant demurred, when it was resolved, that the office of under-sheriff is of long use, and, as deputy to the sheriff, he is invested with all the rights of office of the sheriff himself, such as executing process, executions, &c. that the sheriff therefore cannot make an under-sheriff without giving him those powers, or abridge him of any part of them. That this condition, therefore, being to deprive the under-sheriff of one of the rights annexed by law to his office, was illegal and void.

Sir Daniel Norton v. Simes.  
Hob. 12.

For it is essential to the appointment of a deputy, that he be invested with all the power and authority of his principal; and any covenant or condition to restrain it, is void in law.

Parker v. Kett.  
Salk. 95.

But under this head of bonds void for the illegality of the consideration, two cases deserve notice. The first is, “that though money has been lent to be applied to uses contrary to law by the obligor of the bond, and that known to the obligee himself (the lender of the money) the bond is good. Though if the bond had been given to discharge a debt arising from an illegal transaction between the obligor and the obligee, it had been otherwise.”

As

*Falkney v. Reynous.*  
4 Burr. 2069.  
*Petrie v. Han-*  
*nay,* ante 89.  
S. P.

As where the plaintiff and one *Richardson* were jointly concerned in certain stock-jobbing contracts, which were contrary to statute 7 Geo. 2. c. 8. and the plaintiff having paid 3000*l.* on that joint account, the bond in question was given by the defendant for the repayment of a moiety of that sum by *Richardson*. On debt brought on the bond this special matter was shewn, and on demurrer the court was of opinion, That as between the plaintiff and the defendant it being a fair loan of money, and nothing illegal, that the bond was good; but had it been given *for the money due on the contract for stock*, contrary to the statute, it had been void.

Secondly, "If a bond is for performance of articles of agreement, and part of them are contrary to law, though part of them are legal, yet is the bond void in *"toto."*

*Lee & Ux. v. Colehill.*  
Cro. Eliz. 529.

As where in debt on a bond for performance of covenants in an indenture, they appeared to be that the defendant covenanted that he being customer of *London*, had made one *Smith* (who was the plaintiff's testator) his deputy, and that he would surrender his letters patent, and procure others appointing *Smith* and him to the office, and that if *Smith* died living the defendant, that he would pay to his executor 300*l.* for which this action was brought. The defendant pleaded the statute 5 Ed. 6. c. 16. against the sale of offices. The plaintiff insisted, that part of the covenant being good, that the obligation should be good as to these; but it was adjudged that the whole obligation was void, for so by putting in one good covenant, the whole statute would be evaded.

## 2. Bonds void by Matter subsequent, are these:

Co. Lit. 206.  
a. b.

1. If the condition of a bond is possible at the time of making (as if the condition be that *J. S.* shall marry *A. B.* within a month) but before the time come it becomes impossible, First, *By the act of God* (as if *A. B.* dies within the time;) or, Secondly, *By the act of the obligee himself* (as if he marry her himself;) or, Thirdly, *By the act of law* (as by *A. B.* marrying another, so that to marry *J. S.* is contrary to law;) in all these cases the obligation is saved, and the bond void.

*Ibid.*

But if the condition of a bond is impossible at the time of making, as that the obligor shall go to *Rome* in a day,  
the

the bond is not void, but is single, that is, for the payment of money without any condition.

2. If the condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond (as where it was that the defendant should either purchase to the use of J. S. his heirs, &c. lands of a certain value, or leave to the said J. S. by legacy, or otherwise, money to such an amount, that then, &c.) and one becomes impossible by the act of God, the obligor is not bound to perform the other part, for the condition is for the benefit of the obligor, and he has his option to perform either part to save his condition; and when deprived of one by the act of God, he shall not be called on to perform the other. Laughter's case.  
5 Co. 21. b.

## 2. OF DEBT FOR RENT.

1. "At common law no action of debt lay for the arrears of a freehold rent, during the continuance of the lease."

Therefore if there was a lessee for life, and the lessor died, the rent being in arrear, such rent was not recoverable during the continuance of the life-estate: for the arrears belonged to the executor, but could not be recovered, as no action of debt lay for them, and the heir had no title to the rent which became due in the lifetime of the ancestor. Andrew Ognel's case, 4 Co. 49.  
Co. Lit. 162. a.

"But after the determination of the estate for life, the arrears then due were recoverable at common law by an action of debt, for the sum due was not as a freehold rent, but as a personal charge." S. C. & Roll.  
Abr. 595. Co.  
Lit. 162. a.

2. But a change was effected by statute 32 H. 8. 37, which enacts, "That the executors or administrators of a tenant for life (that is *pur autre vie*, living *cestui que vie*. Co. Litt. 169.) in tail or in fee, may have an action of debt to recover all arrearages of rent due in the life-time of the lessor, and during the continuance of the estate for life, from the tenant for life, who continues in possession, and ought to have paid the rent to the lessor when living, or against the executors or administrators of such tenant."

And

And by the 3d sect. of the same statute, "The husband  
" may have debt for arrearages due in the lifetime of his  
" wife, in her right."

Bishop of Win-  
chester v.  
Wright.  
1 Lord Raym.  
1056.

This statute only provided for the recovery of the rent in arrear at the death of the lessor, but gave no action of debt to him during his life, so that during that time his only remedy was an affize. But that was provided for by statute 8 Ann. c. 14. s. 4. which enacts, "That any person entitled to rent arrear on a lease for life or lives, may have an action of debt *during* the existence of the life, as on a lease for years during the term."

Litt. sect. 58.

3. Such was the case of rents reserved on freehold leases; but rents reserved on *leases for years* were at all times recoverable by action of debt.

Litt. sect. 72.

4. So where there is *tenant at will*, with a rent reserved, the lessor might always have an action of debt for arrears of rent.

5. As to *tenants at sufferance*, it seems that an action of debt lay not against them for rent arrear, for the contract was determined, and they were in by wrong; but in such cases there is now a special provision made by stat. 4 Geo. 2. c. 28, which enacts, "That if tenants for life or years, or persons coming in under or by collusion with them, *hold over*, after determination of their estates, after demand made in writing for delivering possession thereof by the person having the reversion or remainder therein, or his agent, such tenant shall forfeit *double the value* of the premises, to be recovered in an action of debt."

And by stat. 11 Geo. 2. c. 34. s. 18, it is enacted, "That in case any tenant shall give notice of his intention to quit the premises, and shall not accordingly deliver up the possession at the time in such notice contained, the said tenant, his executors or administrators, shall pay to the landlord *double the rent which he would otherwise have paid*."

Upon these statutes several decisions have taken place.

Williamson v.  
Colley.  
5 Burr. 4694.

1. A receiver appointed under an order of the Court of Chancery, is "an agent properly qualified" within the words of the statute; and if he gives notice to the tenant to quit, and the tenant holds over, he shall forfeit the double value.

2. Where



2. Where the statute says, "After demand and notice s. c. in writing," the notice in writing is of itself a sufficient demand.

3. The notice to quit, under stat. 4 Geo. 2. may be before the expiration of the lease or time of demise. *Cutting v. Derby.*

4. One tenant in common may maintain this action for the double value of his moiety. *2 Black. Rep. 1075. S. C. 1077.*

5. The notice by the tenant to quit, under stat. 11 Geo. 2. need not be in writing. A parol notice to quit is sufficient. *Timmins v. Rowleson. 3 Burr. 1603.*

6. A parol demise from year to year is a sufficient holding within the statute, so as to subject the tenant to the penalty of double rent, if he holds over after he has given notice to quit. *S. C.*

6. By stat. 11 Geo. 2. c. 19. s. 12, "If an ejectment is served on any lands, &c. if the tenant does not give notice to the person of whom he holds, of the service of such ejectment, he shall forfeit three years rent of the premises, to be recovered by action of debt."

### 3. OF DEBT ON MATTERS OF RECORD.

These are 1st, On Bail Bonds and Recognizances. 2d, On Judgments. 3d, For Amercements in inferior courts. 4th, For Costs. 5th, On Statutes and Recognizances.

#### 1st. Of Debt on Bail Bonds and Recognizances.

1. By stat. 12 Geo. 1. s. 29, it is enacted, "That no person shall be held to special bail on any process issuing out of any superior court where the cause of action shall not amount to 10*l.* or upwards; and in such case affidavit shall be made of the cause of action, and the sum specified in such affidavit shall be indorsed on the back of the writ or process; for which sum so indorsed the sheriff shall take bail, and for no more."

But if the sheriff does take bail for more than the sum sworn to and marked on the writ, it is not for that reason void, though he may be punishable. *Naden v. Horsley. 2 Will. 69.*

This statute therefore settles the only cases in which a bail-bond is to be taken, viz. when the debt amounts to 10*l.*

10*l.* or upwards; and the manner of taking the bond is settled by stat. 23 *H. 6. c. 10. f. 1.* which enacts, "That the sheriffs shall let out all persons in their custody, by force of any writ, bill, or warrant in any action personal, or by cause of indictment of trespass upon reasonable sureties, except such persons as are taken by execution, *capias utlegatum, excommunicato capiendo*, surety of the peace, or such as are committed by special command of the justices."

"And no sheriff shall take any obligation for any cause aforesaid, but to themselves by their name of office, with condition that the defendant shall appear at the return of the writ at the place required in the writ: and if the obligation is taken in a different form, it is void."

Under this statute it has been decided,

Rogers v.  
Reeves.  
1 Term Rep.  
418.

1. "The undertaking for the appearance of the defendant must be *by bond*:" for where it was an undertaking in writing only to the following effect: That one *Stephens* having been arrested by the plaintiff (who was bailiff to the sheriff of *Surry*) on a writ for 35*l.* the defendant undertook to put in good bail on or before the return of the writ, or to surrender the body of *Stephens* to the plaintiff, or on default to pay the debt and costs. Afterwards the plaintiff was obliged to pay the money, the defendant not having performed any of the conditions, and brought *assumpsit* for the money so paid, against the defendant on this undertaking, when the court held, That the statute having pointed out the mode, *viz. by bond*, that it was to be pursued; and that a simple contract undertaking was void.

Stryven v.  
Dyther.  
Cro. Eliz. 672.

2. "So the bond must be *with sureties*," for such are the "words of the statute." Therefore where the bond was only by the *defendant himself*, conditioning, that he the said *R. Dyther* would personally appear before the King's Majesty at *Westminster, die Pasch. 15 dies*, to answer, &c. it was held to be bad. But a case was quoted of a *Sir W. Drury*, wherein it was held, That an obligation with *one surety* was good.

Per Buller.  
1 Term Rep.  
122.  
Symes v. Oakes.  
2 Stra. 893.

3. "So the bond must be made to the sheriff *by his name of office*;" but the court held, that though such ought to be the form, yet that in this case the bonds being laid *solvend. eidem vicecom. & assign.* was sufficient.

Bennet v. Filkins.  
1 Saund. 20.

4. "The condition must be to appear *at the return of the writ*;" for where the sheriff took a bail-bond for the appearance

appearance of the defendant at a day different from that in the writ, it was held to be void.

So where the condition of the bond was for the defendant to appear on the Morrow of *All Souls* (3d of November) and the date of the bond was the 4th of November, it was adjudged to be void. *Samuel v. Evans*, 2 Term Rep. 560.

"But if the substance of the return appears in the bond, the very words of the writ need not be set out."

For where the writ was returnable *coram domino rege ubi- cunq. fuerimus in Anglia*; and the bail-bond wanted those latter words, it was nevertheless held good. *Shuttleworth v. Pilkington*, 2 Stra. 1156.

5. "The statute extends only to cases on *mesne process*; and all other obligations made to the sheriff are void."

For where the bond was given to the under-sheriff for a sum for fees of executing an extent, it was adjudged to be void under stat. 23 H. 6. for one view of the statute was to prevent extortion by confining the obligation only to the condition of appearing. *Cro. Eliz.* 808. *Empton v. Ba- thurst*, Hutt. 52.

"And it must be founded on good and legal process;" for where it was taken on a writ which appeared to be returnable on a day out of term: the writ being void, the bail-bond was held to be so too. *Mills v. Bond*, 1 Stra. 399.

Though under the statute, if the defendant did not appear, the bond was forfeited, yet the plaintiff was delayed in his suit; for remedy of which, and to expedite the proceedings, it was enacted by stat. 4 & 5 Ann. c. 16. §. 20. "That if any person shall be arrested by process out of the courts at *Westminster*, at the suit of a common person, and the sheriff or other officer take bail, the sheriff at the request and costs of the plaintiff, or his attorney, shall assign the bail-bond, by indorsing the same, and attesting it under his hand and seal, in the presence of two witnesses without stamp, provided it be stamped before action brought thereon; and if the security be forfeited, the plaintiff after assignment may bring an action thereupon in his own name."

1. As the appearance-day is the *quarto die post* the return-day, the assignment should not be made till the four days are expired. *Studley v. Sturt*, 2 Stra. 782.

But of the four days the return-day itself is exclusive, and the day following is counted the first; and therefore where *Bullock v. Heather*, 2 Stra. 914.

where the return-day was on a *Wednesday*, the bail-bond was held not to be assignable till after *Monday*, for *Sunday* is not to be reckoned as one of them; and where it is the fourth day, the party shall have all *Monday* to put in his bail.

Gregfon v. Hea-  
ther.  
2 Stra. 727.

2. The sheriff may assign the bail-bond in any county, and the plaintiff has his election to bring his action either in the county where the assignment was made, or in the county to the sheriff of which the writ was directed: as here, where the writ was into *London*, and the assignment in *Middlesex*, where the action was brought.

Kitfon v. Fagg.  
1 Stra. 60.

3. The sheriff, or under-sheriff, may make the assignment of the bail-bond, and these only can make it; for where in this case the assignment was proved to have been made by the under-sheriff's *clerk*, it was adjudged to be bad.

Walton v. Bent.  
3 Burr. 1923.  
Morris v. Rces.  
3 Will. 248.  
S. P.

4. And the action on the bail-bond must only be brought in that court where the bail was given, or otherwise the proceedings will be stayed, for the writ gives jurisdiction to that court only.

Samuel v. Evans.  
2 Term Rep.  
569.

It was formerly a doubt whether the statute 23 *H. 6.* was not a private act, but in the case of *Saxby versus Kirkus, Buller, N. P. 224*, it was held, that the statute 4 & 5 *Ann. 16.* by recognizing it, had made it a public act, and accordingly where the plaintiff had declared as assignee of the sheriff; but in setting out the bail-bond, it appeared not to be within the statute, and so void: the court held, That they could take no notice of the statute of *Hen. 6.* without its being pleaded, and that the judgment might be arrested after the plea of *non est factum*.

2. "Such are the cases of bonds given on mesne pro-  
cess: I shall now consider the recognizance entered into  
"by the bail above; whereby they undertake, that if de-  
"fendant be condemned in the action, that he shall pay  
"the costs and condemnation, or render himself up a pri-  
"soner, or that they will pay it for him."

Upon this recognizance the plaintiff in the original ac-  
tion may have debt against the bail, in case of the default  
of the principal; but as the declaration is very prolix, it is  
more usual to sue the bail by *scire facias*; and debt is only  
adviseable where the principal has run away, and the bail  
are likely to become insolvent; and for this reason, that in  
debt

debt on the recognizance the bail are held to special bail, but not so on a *scire facias*.

But as debt may be brought against the bail, it will be proper to consider the cases on that head.

1. Before the plaintiff can proceed against the bail, either by debt or *scire facias*, there must issue a *ca. sa.* against the principal (the defendant in the action;) for one of the conditions of the recognizance was, that the defendant's body should be had in execution; and therefore the recognizance is not forfeited till that is not forthcoming, which is only judicially known by the return of *non est inventus* on the *ca. sa.* Hobbs v. Tedcastle.  
Cro. Eliz. 597.

Therefore where the bail brought error, and assigned it, that judgment was given against them without any *ca. sa.* Price v. Price.  
Cro. Eliz. 733. having been awarded against the principal, judgment was for that fault arrested.

2. But a difference is to be observed where the proceedings are in debt on the recognizance, and by *scire facias*.

"For if the plaintiff brings debt on the recognizance against the bail, they can surrender their principal *before the return of the process against them*, but not after."

For where the plaintiff having brought his action on the recognizance in *C. B.* but finding that the defendant (the bail) was an attorney of *B. R.* was forced to desist, and filed his bill in *B. R.* the first day of *Michaelmas Term*; on the 20th of *October* the defendant had surrendered his principal: on motion, the proceedings were stayed; for those in *C. B.* were of no avail, and the tender of the body being before return of the process, was time enough: for the plaintiff should have commenced his action in the proper court at first. Hoare v. Minster.  
1 Gay.  
2 Stra. 915.

And where the plaintiff brings debt against the bail, they shall have eight days after the return of the writ to surrender the principal; and if there are but four days in the term after the return, they shall have four days in the term following. Milner v. Pettie.  
1 Lord Raym.  
720.

But where the plaintiff proceeds by *scire facias*, upon *non est inventus* returned, the bail have till the return of the second *scire facias* to surrender the principal and discharge themselves. Walmsley v. Havand.  
Cro. Eliz. 6:8.

Steward v. Smith  
2 Stra. 866.

And the first *scire facias* may be tested of the same day the *ca. fa.* is returnable.

Alyson v. Byf-  
ton.  
Cro. Eliz. 738.

And there should be fifteen days between the teste and the return of each *scire facias*.

Postle v. Watfon.  
2 Black. Rep.  
922.

Therefore where the *ca. fa.* was returnable *cras. Trin. 7th of June*, and the first *scire facias* was returnable (*Quinden, Trin. 21st June, but the last on Tres. Trin. 28th June*) this last was quashed, there not being fifteen days between the teste and return.

"But this allowance of time till the return of the second *scire facias*, is not matter of right but of favour."

Glyn v. Yates.  
1 Stra. 511.

For where the principal died before the return of the second *scire facias*, the bail were held to be liable. And in a yet stronger case,

Barry v. Barry.  
2 Stra. 617.  
2 Will. 67.

Where the principal died after the return of *non est inventus*, and before any *scire facias* issued, yet were the bail held to be charged: for in strictness of law the bail are chargeable after the return of *non est inventus*, and the *scire facias* is merely *ex gratia*.

2. "But in the following cases the bail shall be discharged:"

1. "Where there has been an actual surrender."

Bailey v.  
Smeathman.  
4 Barr. 2134.

But where the action has been *by original*, the bail need not surrender on the return-day of the *scire facias*, but have till the appearance-day, that is, the *quarto die post* to do it.

"And the surrender must be during the sitting of the court."

Simonds v.  
Middleton.  
1 Will. 269.

For where on the second *sci. fa.* issued against the bail, they surrendered the principal on the *quarto die post* to a judge at his chambers, the surrender was held to be too late, and the bail fixed with the debt and costs.

Webb v. Har-  
vey.  
2 Term Rep.  
757.

However, before the bail are absolutely fixed where a surrender can be made, they should be summoned time enough to make a surrender of their principal; for where in this case, the *scire facias* was returnable the 14th of November, and the bail were not summoned till about an hour before the rising of the court, and the sheriff returned *scire feci*, the court set the proceedings aside, holding that summons insufficient, as being too short notice.

## 2. "If an actual surrender cannot be made."

As where the principal *became a peer*, so that by law his Trinder v. Shir-  
body could not be surrendered, it was held that an *exonerat-ley.*  
*ur* should be entered on the bail-piece. Dougl. 45.

So where a man *had been pressed*, and was then in custody, Bond v. Isaac.  
and so that by stat. 29 Geo. 2. c. 4. s. 14. he could not be Burr. 339.  
taken out of his Majesty's service, except for a criminal  
matter, his bail in a civil action were allowed to bring him  
into court by *habeas corpus*, and surrender him by commit-  
ting him to the custody of the marshal, and *instantly* re-  
manding him to the *Savoy*, after entering an *exoneretur* on  
the bail-piece.

3. "Though the defendant has judgment in the court  
below, yet the bail are not thereby actually discharged."

For if error be brought on that judgment, and it be re- Loff v. Kel-  
versed, the bail still are liable, though the condition of the bridge.  
recognizance was to surrender, &c. *if condemned in the ac- Cro. Jac. 94.*  
tion in the said court; for the judgment being reversed, it is  
as if it never had been.

4. But if the plaintiff has judgment, and the defendant Meyerv. Arthur.  
brings a writ of error and a *sci. fa.* is sued out, *proceedings* 1 Stra. 419.  
*will be stayed against the bail*; but it is on the terms of the  
bail's consenting that if the judgment be affirmed, they  
shall surrender the principal, or give judgment on the *scire*  
*facias*.

1. "But it must be on application by the bail, before  
judgment against them had on the *scire facias*."

For where the plaintiff got judgment on the *scire facias* Fisher v.  
against the bail, pending error by the principal, and took Emerton.  
them in execution, and they moved to be discharged, *per* 1 Stra. 526.  
*cur.* if the bail had applied before judgment the court  
would have stayed proceedings: or if an action of debt  
had been brought on the judgment, they would have  
granted an *imparlance*; but the bail by suffering judgment  
to go, have submitted to meet the plaintiff, and the judg-  
ment must stand.

2. So the bail must apply to stay proceeding *before the* Everett v. Gerv.  
*return of the second scire facias*: for after the return of the 1 Stra. 443.  
*second scire facias* the bail cannot surrender the principal,  
and therefore are fixed with the debt and costs.

"And the reason of these decisions is this;" That pend- Wicksted v.  
ing a writ of error, the court cannot award execution, so Bradshaw.  
that Hob. 116.

that no *capias* can go against the principal; and therefore as the bail cannot take and surrender him, they shall not be charged.

Hunter v.  
Sampson.  
2 Str. 781.

3. But the court will not stay proceedings against the bail merely on *bringing* a writ of error, unless bail to the writ of error has been actually put in; for till then it is no absolute supersedeas.

Pool v. Char-  
nock.  
3 Term Rep. 79.

So if the writ of error appears to be brought merely for the purpose of delay, as where it was sworn that the defendant and his attorney had declared that they would delay the plaintiff by every means possible, the court refused to stay the proceedings against the bail.

## 2d. Of Debt on Judgments.

Speak v. Rich-  
ards.  
Hob. 206. S. C.  
Noy 22.  
Cro. Car. 539.

1. " If a man recovers in the *superior courts* a debt or damages for any injury, in any action real or personal, he may afterwards have an action of debt on that judgment."

This was the common law remedy in cases where execution had not been sued out before the expiration of the year and day after the judgment. But the statute of *Westminster 2d*, c. 45, having given the *scire facias* on the judgment, that is the practice now.

Glascock v.  
Morgan.  
1 Lev. 92.

But however, debt is still often brought on judgments: and it will lie for the *remainder of the sum recovered*, where part has been levied on the goods of the defendant: so it will lie pending a writ of error. *Gribble v. Abbot. Cowp. 72.*

7 Mod. 62, 14.  
Sid. 236.

" But the judgment must be an actual and subsisting judgment at the time of the action brought; for if by any means it has been discharged, this action will not lie."

Vigors v. Ald-  
rich.  
4 Burr. 2483.

For where the defendant's person had been taken in execution by a *ca. sa.* on the first judgment, and had been afterwards discharged out of custody, by consent of the plaintiff, on the defendant's entering into an agreement to pay certain sums at certain stipulated times, part whereof he had paid when the plaintiff brought debt on the judgment for the *whole*: but the action was held not to lie, for the judgment was discharged by the plaintiff's own consent; and so he could not have an action on it.

Jacques v.  
Withy.  
1 Term Rep.  
557.

So where to an action of *assumpsit*, the defendant pleaded a set-off of a judgment recovered by him, *Trin. 22 Geo. 3.* against



against the plaintiff, the plaintiff replied and admitted the judgment; but said, that in *Mich. 23 Geo. 3.* he had been charged in execution by virtue of such judgment, and that on the 6th of Feb. 1783, he had, by the consent, privity, and authority of the defendant, been discharged out of custody, and from the said execution. The defendant rejoined, that the discharge was in consideration of the plaintiff giving him a bond to the amount of the debt to secure an annuity, which annuity-bond, &c. had been set aside by the court of *C. B.* the memorial having been erroneously entered: to this was a demurrer, where it was held clearly, that the first judgment was completely at an end by discharging the plaintiff out of custody, and that the defendant could therefore never resort to it again, even though the consideration had failed for which he had discharged him.

2. Debt will lie upon a judgment of a foreign court (as in this case the supreme court of *Jamaica*) but it is not to be declared on as a matter of record, for it is here but of the nature of a simple contract debt; therefore in such case the judgment is sufficient only to establish a demand, and put the defendant to impeach the justice of it, or shew the same to have been unduly or irregularly obtained.

*Walker v. Witter.*  
*Doug. 1.*

And as it is but a simple contract, *assumpsit* will also lie on it; as was decided in the two cases here mentioned; one of which was from *Jamaica*, and the other from *Ben-gal*. And in another case from *Vernon*, where the judgment was from *France*, and held that *assumpsit* would lie.

*Crawford v. Whittal.*  
*Hill. 13 G. 3.*  
*Sinclair v. Frazer.*  
*Doug. 4.*  
*Anon.*  
*2 Vern. 540.*  
*Shaw v. Thompson.*  
*Cro. Eliz. 426.*

So debt was adjudged to lie for a sum recovered in a court baron.

### 3d. Of Debt for Amercements in inferior Courts.

As where the steward of a court leet amerced a person for contemptuous words: it was adjudged lawful, and that debt lay for it.

*Earl of Lincoln v. Fisher.*  
*Cro. Eliz. 581.*

So debt lies for an amercement in a court baron.

*Wicker v. Norris.*  
*Bull. N. P. 167.*

### 4th. Of Debt for Costs.

Debt lies to recover the costs of a nonsuit in an inferior court, by the defendant below: and a general declaration is good, without setting out that the cause of action arose within

*Murray v. Wilson.*  
*1 Will. 326.*

within the jurisdiction of the inferior court, or the proceedings at length.

### 5th. Of Debt on Statutes and Recognizances.

1 Roll. Abr.  
599.

1. Debt lies on a statute merchant, and also on a statute staple, for both are under the seal of the parties, and have all the solemnities of an obligation.

Afcue v. Hol-  
lingworth.  
Cro. Eliz. 494.

So where an obligation was entered into as a statute staple, but was void *as a statute*, for want of two seals in pursuance of the statute of *Alton Burnell*, yet the plaintiff was allowed to bring debt on it, as an obligation; and he recovered.

Trott v. Spar-  
ling.  
Moor. 118.  
Chamberlain v.  
Thorp.  
Cro. Eliz. 187.

2. So upon a *recognizance* taken in pursuance of stat. 23 H. 8. c. 6. before the Chief Justices of the *King's Bench* and *Common Pleas*, or the Mayor of the staple at *Westminster*, out of term, and the Recorder of *London* jointly, for payment of money, and on which the process is the same as upon statutes staple, debt will lie, by stat. 8 Geo. 1. c. 25.

Cowper v. Lang-  
worth.  
Cro. Eliz. 608.

So if the recognizance is taken in *Chancery*, debt lies on it.

Roll. Abr. 600.  
Danv. 498.

And in like manner if the tenor of the recognizance so taken is certified into the *King's Bench*: for the tenor under the great seal is of the same notoriety and validity as if the original under the seal of the conusor had been produced.

### 2. DEBT WITH REFERENCE TO THE PERSON.

This is 1st, As to Persons in General. 2d, As to the Heir, Executor, or Administrator. 3d, As to Baron and Feme. 4th, As to Assignees. 5th, As to Sheriffs and their Officers.

#### 1. AS TO PERSONS IN GENERAL.

" No one shall be charged in debt on any bond or obligation, to any matter, or to any person not mentioned or included in it; for its extent shall be strictly limited to the condition."

Barker exec. of  
Pyott v.  
Parker.  
Term Rep. 287.

As where a bond was entered into by the defendant as surety for one *Hampton*, conditioning for his service and faithful

faithful account of all monies of the obligee, his executors or administrators, which should come to the hands of the said Hampton, while he served the obligee as his clerk. The obligee died, and the executors having continued the business, it was adjudged, that the bond did not extend so as to make the defendant who was surety liable to them, on Hampton's default, for the bond was personal to the obligee himself.

So where the defendant had joined in a bond to the plaintiff, as surety for the faithful service of one Baird as broad-clerk to the plaintiff; the plaintiff afterwards took one Delafeld into partnership, and in debt on the bond the breach was assigned in Baird's having embezzled money of the partnership: to this was a demurrer, and the action was adjudged not to lie, for the bond was for performance of faithful service to Wright (the plaintiff) only, not to him and his partner.

These cases go on the ground of the obligation being personal; but where the bond was not so, as where it was made to the house, viz. for faithful service in the counting-house and shop; and the then partners in the house, to whom the obligation had been made, took in another partner, the bond was held still to remain in force; and the obligees recovered on it.

## 2. OF DEBT BY OR AGAINST HEIR, EXECUTOR, OR ADMINISTRATOR.

1. "The obligee of a bond may bring his action either against the heir or executor:" for the obligor binds his heirs, executors, and administrators, and therefore where it was brought against the heir, and he pleaded that he had administered, the plea was held to be ill, as both were liable.

Davis v. Churchman.  
3 Lev. 189.  
Davis v. Pepys.  
Plowd. 439.  
S. P.

2. "In no case shall an executor be charged in debt where the action would not lie against his testator."

For where A. covenanted with B. to put his son apprentice to C. or that A.'s executors should pay to B. 20*l.* the son was not put apprentice, and A. died: it was adjudged, that debt lay not for the 20*l.* by B. against A.'s executor; for that testator himself had never been liable. But,

Perrott v. Aulten.  
Cro. Eliz. 232.

N. B. The authority of this case was doubted by Lord Mansfield. Burr. 1383.

3. If

Archbishop of  
Canterbury v.  
Houfe.  
Cowp. 140.

3. If an administrator does not perform the requisitions of his administration-bond, the ordinary may authorize a creditor or the next of kin to sue him on the bond: for the next of kin are interested in the surplus, and a creditor in the present disposal of the intestate's effects.

Archbishop of  
Canterbury v.  
Wills.  
Salk. 315.

Before the statute 22 Car. 2. an executor or administrator was compellable to account, but the ordinary was obliged to take the account as he furnished it without examining: so was a creditor, if he sued in the ecclesiastical court, for he had a proper remedy at common law. But if a legatee had sued for an account in the ecclesiastical court, the defendant, before the statute, was obliged to prove the whole account, for the legatee had no other remedy, and the court could no otherwise exercise its jurisdiction of legacies to effect. Since the statute, a person intitled to distribution is as a statute legatee, and shall therefore have the same remedy as a legatee before the statute; and now being by the condition of his administration-bond bound to account at a day certain, he shall do it without citation: but this account is not examinable unless a party interested comes in and controverts it. And the condition of the bond being, that he shall administer well and truly, that shall be construed in bringing in his account, and not in paying the debts of his intestate: and therefore a creditor shall not take an assignment of the bond and sue it, and assign for a breach the non-payment of a debt to him or a devastavit committed by the administrator; for that would be needless and infinite.

Roll. Abr.  
931.

4. Executors are no further chargeable than they have assets, unless they make themselves so by their own act, as pleading a false plea; i. e. such a plea as would be a perpetual bar to the plaintiff, and which they know to be false; as *ne unques executor* or a release to themselves; but if they plead a former judgment by another person *et nil ultra*, and the plaintiff replies *per fraudem*, and it be so found, yet judgment shall be *de bonis testatoris*.

### 3. OF DEBT BY OR AGAINST BARON AND FEME.

Ankerstein v.  
Clark.  
4 Term Rep.  
616.

1. If a bond is given to an husband, and wife administratrix, he may bring an action on it in his own name as a bond made to himself.

Read v. Jewson.  
Hill. 1773.  
Quot. per Buller,  
Just.  
4 Term Rep.  
362.

2. By the custom of London, a *feme covert* may be a sole trader, and sue and be sued for her own debts so contracted; but in such case she cannot give a bond and warrant of

of attorney to confess a judgment: So when sued as a *feme sole*, she must be sued in the courts of the city of *London*; for if sued in the courts above, the husband must be joined.

So the wife alone cannot bring an action in the courts above, but only in the courts of the city of *London*; and even where the husband was dead, and she brought an action in the court of *King's Bench* for goods sold and delivered by her while a *feme sole trader*, it was adjudged, that the action could not be maintained by her in her own name in that court. Caudell v. Shaw. 4 Term Rep. 361.

3. If a lease be made to a woman *dum sola*, and she marries, the term expires and she dies: debt lies against the husband for rent accruing during her lifetime; for he is chargeable by reason of the perception of the profits. Vane v. Minshull. 1 Lev. 25.

#### 4. OF DEBT BY OR AGAINST ASSIGNEES.

1. If there is a lessee for years, and he assigns all his interest to another, yet may lessor still have an action of debt against him for rent in arrear after assignment: first, Because the lessee shall not prevent by his own act such remedy as the lessor hath against him on his contract. 2dly, That the lessee might grant the term to a poor man who would not be able to manure the land, and so for need or malice the land would lie untilld, and the lessor be without remedy, either by distress or action of debt. Walker's case, 3 Co. 22.

But the lessor may accept the assignee for his tenant, and so discharge the original lessee. And if he once accepts rent from the assignee, he can never again resort back to the first lessee. Marsh v. Brace. Cro. Jac. 334.

But the assignee is bound to the rent no longer than while in possession, and he may at any time assign over his term and so discharge himself; and if even to an insolvent person, it shall discharge him: for the action as between the lessor and the assignee is founded on the privity of estate, which is gone by the assignment. Lekeux v. Naffr. 2 Stra. 1221. Pitcher v. Toovey. Salk. 81.

But if a lessee for years dies, his executor or administrator may assign the term, and shall not be chargeable for rent after the assignment; for as they could sell the term to pay debts, so they can assign it, and be discharged from all subsequent demands of rent. And it was further held in this case, that if the lessee for years assigns over his term and dies, the executor shall not be charged for rent due after his death; Marrow v. Turpin. Cro. Eliz. 715. Overton v. Sydhall quot. 3 Co. 24, a.

death; for by the death, both privity of estate and contract was at an end.

3 Co. 23. a.

2. If the *lessor grants away his reversion*, he cannot have an action of debt for the rent, for he has granted the reversion to another, to which the rent is incident. So that the grantee of the reversion alone can have the action. But if the lessor had so granted his reversion, and the *lessee had assigned his term*, the grantee should not have debt against the lessee after assignment, for there was no privity between them but by reason of the privity of estate, and that being gone by the assignment, the action will not lie.

Humble v. Glover.

Cro. Eliz. 328.

S. C. 3 Co. 23. b.

“ And it is the same whether the person claiming the rent comes in *by succession or by grant.*”

Overton v. Syddall.

Cro. Eliz. 555.

As where a prebendary made a lease, confirmed by dean and chapter, the lessee died, and his executor assigned. Afterward the prebend died, and the plaintiff being named his successor, brought debt against the executor of the lessee, and adjudged that the action would not lie, for the privity was gone by the assignment.”

“ But where the lessee *assigns but a part*, he is chargeable for the whole to the grantee of the reversion, on account of the subsisting privity.

Broom v. Hore.

Cro. Eliz. 633.

For where Sir *Christopher Broom* let lands to *Hore*, rendering rent; *Hore* let to one *Wriglesworth* one-fourth part of an acre: afterward Sir *C. Broom* granted the reversion of the whole to one *George Broom* (the now plaintiff) who brought debt against *Hore* for the entire rent. It was contended for defendant, that the privity being gone as to part was gone for the whole. But the court held the reverse: That the entire estate remaining in one part of the land, the privity remained entire, and would support the action.

Robinson v. Cox & Warwick.

1 Lev. 227.

3. If the lessor in fee assigns over to another the rent of a term, and the lessee attorns, the assignee of the rent may have debt for each year in arrear, though the reversion is in the lessor, and of course the privity of estate, for by the attornment there is a privity of contract.

Ards v. Watkins.

Cro. Eliz. 637.

Pultney v.

Holmes.

1 Stra. 405.

Raym. 99, 737.

So he may devise it, and devisee may maintain an action of debt for the rent arrear.

4. If the lessee for years assigns all his term to another, reserving the rent to himself, he shall have an action of debt for the arrears during the term; for though not properly

properly a rent for want of a reversion, yet it partakes of its nature, being a return for the profits which are annual.

#### 5. OF DEBT BY AND AGAINST SHERIFFS.

1. Debt lies against a sheriff, where he has returned *Speake v. Richards.*  
 "that he has levied the money under a writ of *fiery facias*," or such. But otherwise, if he returns "that he has taken goods to such a value, which remain in his hands, *pro defectu emptorem*;" for in such case he shall not be charged in debt. *Hob. 206. Hutt. 11. S. C.*

So debt lies against a sheriff on his return of *having seized goods to the amount of £. — which were rescued out of his hands.* For such is no excuse to any taking on final process, as he may command the *posse comitatus.* *Mildmay v. Smith. 2 Saund. 343.*

And it lies in like manner against the executor of the sheriff, who had levied the money at the suit of the plaintiff in the action. *Parkinson v. Gifford. Cro. Car. 539.*

For when the sheriff has levied the debt or damages against the defendant's estate, the judgment against the defendant becomes immediately discharged, and therefore the sheriff must himself be liable. *Rooke v. Wilmot. Cro. Eliz. 202.*

But the plaintiff in the action may have a *scire facias* against the sheriff, and not bring an action of debt. *Smith & Linsey. Hutt. 32.*

2. Debt lies against a sheriff for the reward given by statute 6 & 7 W. and M. c. 23. on the conviction of coiners; the judge having certified the conviction, which must be proved. *Bignoll v. Rogers. Case K. B. temp. W. 3. 310.*

3. Debt lies against a sheriff, where a person in custody on final process escapes, by the equity of stat. West. 2. and 1 Rich. 2. c. 14. by the party at whose suit the execution was. *Bro. Ab. 19. 2 Inst. 382.*

And where an action of debt is so brought against the sheriff on an escape, the whole sum for which the defendant was in custody at the time of the escape shall be recovered against the sheriff: and if the defendant is seen at large for ever so short a time after a caption on final process, it is an escape. *Hawkins v. Plomer & Hart, Sheriffs of Middlesex. 2 Black. Rep. 1048.*

And the action equally lies whether the escape was negligent or voluntary. *Stonchouse v. Mullins. 2 Stra. 153.*

Or

Ashborough's  
case.  
Cro. Eliz. 17.

Or whether the writ was returned by the sheriff or not.

For the cases on escapes at length, see *Trespass on the Case*, Chap. 13.

Jayson v. Rasth.  
Salk. 209.

4. Debt lies at the suit of the sheriff for his fees for executing an *elegit*, and other fees to which he is entitled.

Tyson v. Pashe.  
Salk. 333.

And it is no objection that an *elegit* may not be a complete execution, for that the plaintiff may be obliged to bring an *ejectment* to recover the possession.

Earl v. Plumer.  
Salk. 332.

And if an *erroneous writ* be delivered to the sheriff, and he executes it, yet shall he have his fees, for it was the fault of the party, and the sheriff has done his duty.

These fees are regulated by stat. 29 Eliz. c. 4. which enacts "That no sheriff or other person shall take more for executing any writ, extent, or execution on the body, goods or lands of any person, than 12d. for every 20s. up to 100l.; and 6d. for every 20s. after that, for the sum he shall levy or take the body in execution for, under penalty of treble damages to the party grieved; and 40l. half to the King and half to the informer."

As to which statute it has been settled,

Woodgate v.  
Knatchbull.  
2 Term Rep.  
148.

1. Under this statute the sheriff is strictly tied down, so that he can demand nothing beyond the allowance given him by the statute, and if he takes more it is extortion, and he is subject to the penalty of it; and in such case he is bound by his return to the writ; and as to the sums he is intitled to levy (*per Just. Buller*) in judgments on actions for simple contracts, or for debt certain, *the sum given by the judgment of the court only is to be levied*, and the expences of levying, &c. is to be paid by the plaintiff in the action, not by the defendant; in which case if he overcharges or levies more, he is liable under the statute. But if the judgment is for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of his execution. In this case the sheriff having charged poundage, and the expences of levying on different executions, against the plaintiff, the sum of 54l. and that sum being found by the verdict, the court gave judgment for treble that sum in damages.

Peacock v.  
Harris.  
Salk. 331.

2. That it extends only to *executions in personal actions*, not to real executions, as an *habere facias seisinam* or *possessionem*. 2. That on a *capias ad satisfaciendum*, the sheriff shall have



have his fees for the *whole debt*. 3. But in *elegit* it seems doubtful whether he shall have them for the whole sum, or only according to the sum levied. 4. The statute does not extend to executions upon *statutes merchant or recognizances*; for the act is only to be understood of cases *where the judgment redditur in invitum*, not where it is by voluntary confession of the party.

3. The statute does not extend to give costs in cases of execution out of inferior courts; so that for these the officer cannot have an action of debt. Brockwell v. Lock.  
Salk. 331.

4. The sheriff may have debt against the *sureties in the bond given under stat. 23 H. 6. for defendant's appearance*; and it is no objection to such bond that the surety had no lands in the county, for the bond is taken only for the sheriff's security; and the statute is silent as to the quality of the sureties, and only declares it void when not made in pursuance of the statute. Cotton v. Weale.  
Cro. Eliz. 364.

Having now considered the grounds of this action: before I proceed to the pleadings, it is proper to observe on *the time* at which this action may be brought.

1. If a man be bound by bond to pay a sum of money at five several days, the obligee shall not have an action of debt till all the days are past, for the contract is entire, so that the breach of it is not complete till all the days are past. Co. Litt. 292. b.

This is where the entire sum is due on a *single bond*; for if it be a bond in a penal sum, conditioned for the payment of money at different days, the condition is broken, and the bond becomes absolute upon failure of payment at any of the days, and debt lies before the last day is past. Cotes v. Howell.  
1 Will. 80.  
Buller N. P.  
168. S. C.

But where debt was brought on a promissory note, payable by installments, it was held that it would not lie till the last day of payment past, though *assumpsit* might. Rudder v. Price.  
H. Black.  
547.

But if a man be bound in a *recognizance* to pay a sum of money at five several days, presently after the first day of payment the conuzee shall have execution on the recognizance for that sum, and shall not wait till the last be past; for it is in the nature of several judgments. Co. Litt. 292. b.

In the case of a bond of indemnity, in which the surety has paid the money, it is not necessary that he should have done it in consequence of his having been sued; for if he pays it without suit, he may then have his action against the principal. Broughton's case.  
5 Co. 24. a.

## 3. OF THE PLEADINGS.

1st, With Reference to the Contract. 2dly, To the Person.

And first, of the pleadings on the part of the plaintiff, considered with reference to the contract.

These are, 1st, On simple contracts. 2dly, On bonds. 3dly, For rent. 4thly, On matters of record:

1st. OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT  
ON SIMPLE CONTRACT.

1. "It was formerly the law, that in debt on a simple contract, the plaintiff was bound to declare on the contract *for the express sum which he was to recover* specifically, and that he could *not recover a less sum than he declared for*; but that strictness is now laid aside, and the plaintiff may recover a lesser sum than in his declaration he states the defendant to be indebted to him."

Mc Quillin v.  
Cox.  
H. Black. Rep.  
249.

This point was expressly ruled in this case; where the plaintiff in reciting the writ in the declaration, viz. *that defendant render to him 500l.*: in the several counts of his declaration the sums together made but 450l.; and the declaration concluded *that the defendant had not paid the said 500l. or any part thereof*: There was a special demurrer for that cause; but the court held the declaration to be good, on the ground that the plaintiff might recover by verdict a less sum than he demanded by his writ.

Aylett v. Lowe.  
2 Black. Rep.  
1221.

But prior to this case the following had been decided. In debt on a *mutuatus* for 250l. and *nil debet* pleaded; the jury found a verdict for 100l. and *nil debet* as to the rest. It was moved to enter up a nonsuit, on the ground that debt being an entire thing, part of the sum could not be so recovered: But the court refused to set the nonsuit aside; and the plaintiff had judgment for the sum so given by the verdict.

Emery v. Fell.  
2 Term. Rep.  
28.

2. In declaring in debt on simple contracts for goods sold, it is sufficient to state generally that the defendant, at *Westminster*, in the county of *Middlesex*, was indebted to the plaintiff in the sum of —l. for divers goods, &c. without alledging *any express contract*, or laying *any place* where the contract on the sale was made; for the words

*sold*

*fold and delivered* imply a contract, and the venue laid in the beginning of the declaration, must imply that the contract was made there.

## 2dly. OF THE PLEADINGS IN DEBT ON BONDS.

1. "In debt on a *simple contract*, the plaintiff should set out in his declaration *the promise or consideration* which is the ground of his action; but in declaring on a *specialty* it must be on a *certain writing obligatory, or deed sealed with his seal*, and conclude with a *profert*; for the bond or obligation is of itself sufficient foundation of the action."

For where the plaintiff declared upon a *certain agreement*, *Simons v. Alexander.* sealed, &c. by the defendant, and had judgment on *nil debet*, the judgment was arrested, for there was nothing in the declaration to support debt, for it could not be on promises, as no consideration was laid, nor was the agreement shewn to be *by deed*. *Gilb. Rep. 237.*

And as the bond is the sole foundation of the action, the court must see that it is properly executed, as on it their judgment is to be founded; and therefore it is matter of substance that *profert* be made of it. And the defendant being entitled to it by law, the court can in no case dispense with it. *Thoresby v. Sparrow.*  
1 Will. 16.  
2 Stra. 1186.  
S. C.

The rule as here laid down is the case, where *the plaintiff declares with a profert*, in which case the court will not say that the defendant shall not have *oyer*; but the court may order that the production of a copy may be *oyer*. *Totty v. Nesbitt.*  
Trin. 24 G. 3.

So if a deed has been lost, in such case the plaintiff should declare *specialty*; that is, *that the deed was lost by time and accident*; for then it would appear on the record that the defendant was not entitled to *oyer*, and such mode of pleading would be good. *Read v. Brookman.*  
3 Term Rep. 151.

And where the party is intitled to *oyer*, the party demanding it has a right to it within *two days* after demand; the day of demand and giving it both being exclusive: therefore when *oyer* was demanded on *Friday*, and judgment was signed on *Monday*, the judgment was held to be irregular. *Page v. Divine.*  
2 Term Rep. 40.

2. "In an action on a bond, the plaintiff should assign but a *single breach*; for so only can the defendant know where to apply his defence."

For

African Com-  
pany v. Macon.  
Gilb. Rep. 238.  
quot 2 Burr.  
773. and 1 Stra.  
227.

For where the defendant being appointed agent to the plaintiffs, gave the bond in question, conditioning for the payment of all sums of money by him received to the use of the company; and the breach assigned was, "That the defendant *had received from J. S. and several other persons, divers sums of money*, which he had not paid to the company." It was held, that the assigning the breach in the receipt of *divers sums from several persons*, was too general and uncertain, and therefore badly assigned.

Cornwallis v.  
Savery.  
2 Burr. 772.

"But where *the transaction* upon which the breach is founded is *entire*, though it consists of many parts, a general assignment of a breach will be sufficient."

As where in debt on a bond as security for a person appointed agent to a regiment, and the breach assigned was, "That the defendant had received several sums of money from the paymaster-general, for the use of the regiment, which he had not paid over to the officers according to their respective proportions." This breach was on demurrer held to be well assigned, for the money was received from one person (not from many, as in the last case) and for one purpose, to pay the regiment; and his omitting to pay *any part* of it was a breach of the bond, and sufficient.

"And where a single breach is assigned, it should be fully and particularly stated in *what manner the breach accrued*."

Jones v. Wil-  
liams.  
Doug. 203.

As where in debt on a bond conditioning for security for the faithful service of a clerk and breach assigned, "That a large sum of money, *viz. 13*l.** came to the clerk's hands on account of the plaintiff, which he (the clerk) had spent and embezzled." This breach was held to be ill assigned, for not shewing *how and from whom the money so embezzled had been received*.

3. "The breach should always be so assigned that by no presumption it shall be out of the condition of the bond; for so judgment might be given without cause of action."

Stibbs v. Clough.  
1 Stra. 227.

As where in debt on a bond which conditioned, "That the plaintiff should furnish the defendant with ale and beer, to be used in his house, at such prices, and that he should take it of nobody else; but might take his other liquors from whom he pleased (malt liquors only excepted)." In debt on the bond the breach assigned was, "that such a quantity of *liquors* was drawn and unpaid for." On de-

mur-  
re

murder, the breach was held to be ill assigned, for it did not appear that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

“ But the assignment of the breach need not be in the words of the condition, if it appears to be within the intention or spirit of agreement.”

For where the condition of a bond was, “ That the defendant should from time to time *render a just and true account* of all monies received by him as treasurer of the parish of B. &c.” and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money, which he had not paid over : The defendant demurred for cause that the breach was not within the condition which was only to *account* : but *per curiam*, the intention of the parties, and fair construction of the condition is, that the money should be paid ; for to construe it a condition to enforce the making out a paper of *items* and figures is idle and nugatory.

Bache v. Proctor. Dougl. 367.

4. “ Where the plaintiff brings debt on a bond for performance of any thing, if the defendant pleads matter of excuse, the plaintiff need not set out a particular breach, for the excuse admits the non-performance, and justifies it.”

As in debt on a bottomry bond, the defendant cravedoyer, and the condition was, “ That if such a ship returned in ten weeks, and gave an account of the profits of her voyage, that then the obligation should be void.” The defendant pleaded that the *ship was lost* and did not return : the plaintiff replied, that the ship was not lost, and the defendant demurred for cause that there was no breach assigned ; but it was adjudged, that the defendant had made it unnecessary by pleading matter of excuse.

Meredyth v. Allyn. Salk. 138.

The only exception to this is, the case of an *award* ; for in debt on a bond to perform an award, if defendant pleads matter to excuse the non-performance, the plaintiff must set out the award and the breach, for the award may be void in the whole or in part, and therefore the award must be set forth, not only that the court may see that there was an award, but also that the non-performance was of a good and not of a void part of the award, for that need not be performed.

Per Holt. S. C.

5. "Where a bond is in the *disjunctive*, a breach of "either part by act of the obligor forfeits the bond, and "is a sufficient assignment of the breach; for the law will "supply those words *which shall first happen.*" (1 Lev. 54.)

Box v. Day &  
Ux.  
1 Will. 59.

As where the defendant's wife, when sole, gave a bond to the plaintiff, which was in a penalty of 1200*l.* if the married *any other person* than the plaintiff, or refused to marry him within one month after the death of her father. Having married the defendant in the lifetime of her father, the plaintiff brought debt on the bond, assigning her marriage as a breach; and it was held to be good, (though insisted, that she might still perform one part of the condition by marrying the plaintiff after her father's death, as he might survive her husband); for that, by the breach of one of the conditions, the bond became absolute.

Hallett v.  
Hodges.  
Sayers Rep. 29.

6. Where the bond was for the payment of a sum of money by installments, *viz.* 150*l.* by 50*l.* on the 1st of November, 50*l.* on the 30th of May, and 50*l.* on the 30th of October; the condition was for the payment of these sums, without the words or *any of them*: It was nevertheless resolved, that the obligee might on default of payment of any of the installments bring his action against the obligor.

Dutch W. In-  
dia Company v.  
Jacob Senior  
Henriques Van  
Moses.  
1 Stra. 612.

7. Debt is in its nature a transitory action, and a bond or other obligation entered into in any foreign country may be sued for in *England*. But in such case, if dated at a certain place, the declaration should set it out as made at the true place, with a "*viz.* at *London*, in the Ward of *Cheap*," or where he means to try it.

Roberts v. Har-  
nage.  
Salk. 659.

Therefore where the plaintiff declared "that the defendant by his bond *apud London concessit se teneri, &c.* to the plaintiff in 40*l.*;" and on oyer the bond appeared to be dated at *Port St. David* in the *East Indies*, which was not mentioned in the declaration, the variance was adjudged to be fatal.

And the reason of these cases seems to be, that where there is an omission of the date or place where made, the bond produced in evidence does not appear to be the same declared on: for a bond made in *London* is not presumable to be the same with one made at *Port St. David's*, and therefore the variance between the proof and declaration must be fatal; it being the constant practice to compare the declaration with the bond produced at the trial. *Bull N. P.* 169.

" But if the deed produced is in *substance the same* with that declared on, if the declaration states matter of *surplusage*, or *no way variant of the deed*, it shall not vitiate."

As where the plaintiff declared on a deed of covenant, dated the 30th of *March*, 1701, *annoq. 13 regn. Gul. 3.* Holman v. Borough. Salk. 658. And on oyer those latter words were wanting; on demurrer for variance, the court held it to be none, for the deed was implicitly the same.

And in this case before, where the plaintiff declared on the bond *solvendum to the plaintiff*, and on oyer it appeared to be *teneri* to the plaintiff for 40*l.* to *pay to his attorney or assigns*, it was adjudged to be no variance, for payment to the plaintiff or to his attorney is the same thing; the *teneri* made it a debt to the plaintiff, and a *solvendum* to any one else would be repugnant. Roberts v. Har- nage. Salk. 659.

8. " This action being transitory, the court will never change the venue, except under particular circumstances." Dupleffs v. Chalk. 2 Stra. 878.

As where the party's witnesses are in a distant county, and then the court will annex conditions to the changing the venue, as undertaking not to bring a writ of error, or giving judgment of the preceding term. Foster v. Taylor. 1 Term Rep. 781.

And *Note*, That the breach being set out in the replication, the plaintiff can only alledge new matter in the specialty declared on, in his replication, *after setting it out on oyer*; and therefore where the plaintiff declared, on articles whereby the defendant agreed to take his *malt liquors* only from him, the defendant pleaded performance and the replication, " That by the same articles it was further agreed, that what should be drawn should be paid for;" and that such a quantity was drawn, was held to be bad. Plen. in Stibbs v. Clough. 1 Stra. 227.

### 3. OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT FOR RENT.

1. In declaring on a *lease at will* for rent arrear, the plaintiff must not only set out a demise, but also aver and prove the *entry and occupation* of the lessee; for the rent is only due in respect of the occupation, and therefore it must appear to the court when the lessee entered, and how long he occupied: but in debt for rent on a *lease for years*, though it is usual in the declaration to say " *virtute cujus, lessee entered*," yet it is not necessary to set out such entry Bellasis v. Bar- brick. Salk. 209.

and occupation; for the action is grounded on the lease, and though the lessee neither enters nor occupies, yet he must pay the rent.

But the want of setting out the occupation on a demise at will, must be shewed for cause of special demurrer, for it will be cured by a verdict.

Welbie v.  
Philips.  
2 Vern. 129.

2. If rent is reserved quarterly or half-yearly, each gale is a distinct debt for which the lessor may have his action, and may declare for an entire gale at the end of any quarter or half year without shewing how the former quarter or half year has been satisfied: but if he declares only for *part of the gale* due at the end of any half year or quarter, it is bad, *unless he shews how the remaining part was satisfied*: for otherwise the lessee may be exposed to many actions for the same demand.

Piltarfc v.  
Darby.  
Show. 8.

And whenever rent or any other duty is received quarterly or half-yearly, the declaration should always state *when it was due and ending*, or it will be bad.

Hulm v.  
Saunders.  
2 Lev. 4.

So if rent is reserved *annually*, to say after by *even portions*, is idle and vain, and no action will lie for an *half year's rent*. And if the plaintiff declares for less rent than a year, without shewing how the rest was satisfied, it is bad, as in the case of *Welbie v. Philips, supra*.

3. "Where the plaintiff in his declaration undertakes to recite a lease or demise, any misrecital is fatal, if the action is founded on such lease or demise."

Sands & Tash v.  
Ledger.  
2 Ld. Raym.  
792.

In debt for rent, the plaintiff declared on a demise "for 15*l. per ann.* rent under a power to make leases for twenty-one years." And on evidence, it appeared to be a demise for 15*l. per ann.* rent, and *three fowls*, under a power to make leases for twenty-one years *in possession, and not in reversion, rendering the ancient rent and not dispensable of waste*: for this variance the plaintiff was nonsuited.

Shute v. Horn-  
scy, quot.  
Dougl. 643.

So where the plaintiff declared on a lease for *three years*, and on evidence it appeared that the lease for three years was void under the statute of frauds, and that the defendant was only tenant from year to year: the lease for three years being laid and not proved, the plaintiff was nonsuited. *Vide Plen. Caus. Bristow v. Wright, Dougl. 640.*

Patterson v.  
Scott.  
2 Stra. 776.

4. If the action is for rent against the original lessee, the venue may be laid either where the land lies or where the deed

was



was executed. But if the action is against the assignee of the lessee, it must be laid where the land lies; for he is chargeable only on the privity of estate.

Therefore where the lessor brought debt for rent against his lessee on a demise of lands in *Jamaica*, made in *London*, and the defendant pleaded to the jurisdiction of the court, that the matter ought to be tried in *Jamaica*, where the lands lay; but the court held, That there was a privity of contract, which is transitory, and so need not be tried where the lands lay.

So against the executor of the lessee, the action must be brought where the land lies, for he is chargeable as assignee on the privity of estate only.

So debt for rent by the assignee of the lessor against the lessee, must be brought where the lands lie, though it is otherwise in the case of covenant, which is transitory.

#### 4- OF THE PLEADINGS FOR THE PLAINTIFF IN DEBT ON MATTERS OF RECORD.

1. In declaring on a bail-bond as assignee of the sheriff, the plaintiff need not set out, "That the debt sworn to was above 10*l*. and that for which the defendant was held to bail, was the sum marked on the writ according to stat. 12 Geo. 1." For the statute does not declare the proceedings void, but only prohibits the sheriff from taking greater bail than for the sum so marked on the writ: and if the sheriff acts otherwise, he is liable to an action at the suit of the defendant, or the defendant may be discharged on common bail; but the bail-bond is still good.

2. Neither is it necessary in declaring as assignee of the sheriff, to state the assignment to have been made "in the presence of two credible witnesses," in the words of the statute, and mentioning their names; nor is any proof of the assignment necessary, for it is not a deed.

3. "In declaring for an amercement in a court leet, the plaintiff should state truly the manner in which the amercement was made, and that it was legally imposed; for being a penalty, the law is always strictly construed."

Therefore where in debt for an amercement in a court leet, the declaration stated the amercement to have been affected

Way v. Yally,  
2 Salk. 651.

Cornel v.  
Liffet.  
2 Lev. 80.

Thrall v. Corn-  
wall.  
1 Will. 165.

Whiskard v.  
Wilder.  
1 Burr. 330.

Leafe v. Box.  
1 Will. 180.

Wyvill v.  
Shepherd.  
H. Black. R.  
162.

affereed at a court holden *before the steward* of the manor; but it appeared in evidence, that the court was really held before *the deputy steward*: for this variance the plaintiff was nonsuited, and the court on application refused to set it aside.

Gery v. Wheatley.  
Sitt. Mich.  
1777.

So in debt on an amercement the declaration stated that the defendant was summoned to serve on a jury of the court leet and court baron; but the summons was to serve on a jury of the court leet only. Lord Mansfield said, this was a case of strict law, it being an action for a penalty; that the plaintiff having stated in his declaration, that the defendant was summoned to a jury of the court leet and court baron, was bound to prove that averment, which the summons not having proved, he must be nonsuited.

Wicker v. Norria.  
3 G. 2.  
Bull. N. P. 167.

In declaring in debt for *an amercement in a court leet*, the declaration ought to state that the defendant was an *inhabitant within the leet* as well at the time of the amercement as of the offence: but this would be cured by a verdict, as it must be proved at the trial.

Co. Litt. 303. a.

4. "Where a matter of record is the ground or foundation of the plaintiff's suit, there it ought to be certainly and truly alledged; but otherwise where it is but inducement or conveyance."

Waites v. Briggs.  
Salk. 565.

Therefore in debt on an *escape*, the plaintiff having declared that the prisoner was committed and escaped, and because he did not say *prout patet per recordum*, the defendant demurred generally; but the plaintiff had judgment, for the gift of the action was the escape, and the commitment only inducement.

And *per Holt* in this case, in debt on a judgment, *quod cum recuperasset* is good without a *prout patet per recordum*; and the defendant may plead *nul tiel record*. So that it seems not necessary to aver a record in the very words, as words tantamount as *quod cum recuperasset* are sufficient.

"As therefore in declaring on matter of record where it is the gift of the action, it ought to be certainly and truly averred, any variance shall be fatal."

Rastall v. Stratton.  
H. Blackst. Rep.  
49.

As where in debt on a judgment the plaintiff in his declaration stated, that in *Trinity Term 1787*, he had recovered by a judgment of the court of *K. B.* 42l. for his costs, in the defence of an action brought by the defend-

ant in that court against *him the said plaintiff*; on *nul tiel record* being pleaded, and the record being produced, it appeared that the judgment was of *Easter Term 1788*, and the action to have been brought by the defendant against the plaintiff and another person; both of which variances were by the court adjudged to be fatal.

So where the plaintiff declared on a recognizance, acknowledged in the court of *Common Pleas*, before the Chief Justice, and *fociis ejus*, and upon *nul tiel record* pleaded, the recognizance produced appeared to have been taken before one of the *puiſne Judges at his chambers*, and by him brought in, and delivered into court; the plaintiff was adjudged to have failed in his record; for the record as entered on the roll and produced, was in fact as it was taken. But in such case there is a difference in the practice of the *King's Bench* and *Common Pleas*, for the *King's Bench* enters all recognizances as taken in court, so that they bind only from the time of being entered there. But the *Common Pleas* enters them specially as taken, so that they bind from the caption. And further, upon a recognizance in *K. B.* a *ſcire facias* lies only in *Middleſex*; but on a recognizance out of *C. B.* either in *Middleſex* or in the county where taken, and so the *venue* must be laid in an action of debt, either in *Middleſex* alone, if the recognizance was in *K. B.* but in *Middleſex*, or where taken if of the *Common Pleas*.

Chetley v. Wood.  
Salk. 659.

S. C. called  
Shuttle v. Wood.  
Salk. 654.

5. If the plaintiff declares in debt on a judgment, he must lay his *venue* where the judgment was obtained, as if the plaintiff had judgment on debt or trespass at *Norwich*, he must lay his action on that judgment at *Norwich*, and not in *Middleſex*; for the original debt or trespass is not now the ground of the action, but the record of that judgment which has created a new debt, and is local.

Hull v. Winchfield.  
Hob. 196.

And Note in general, That in declaring upon *bonds or matters of record*, the declaration should always conclude with an *ad damnum* of the plaintiff; but in *debt for rent*, with a *per quod actio accrevit*. For in the first case the debt arises merely from the bond of judgment; but in the latter from something extrinsic, viz. the enjoyment of the land.

6. And as before in debt upon leases, the declaration on the judgment must be for the whole, or shew how the plaintiff was satisfied, or the declaration will be ill.

Marth v. Litt  
2 Mod. 41.

2d. 7.

2dly, OF THE PLEADINGS ON THE PART OF THE PLAINTIFF, CONSIDERED WITH REFERENCE TO THE PERSON.

These are, 1st, Against the Party himself or his Heir, 2dly, By or against Executors and Administrators. 3dly, By or against Baron and Feme. 4thly, By or against Assignees.

I. OF THE PLEADINGS AGAINST THE PARTY HIMSELF OR HIS HEIR.

F. N. B. 119.

1. The declaration against the *contracting party himself* in all cases of debt, must be in the *debet et detinet*; for he is a debtor by the contract, and does a wrong by withholding what is due.

Goodwin v.  
Newton.  
1 Lev. 130.  
Plowd. 140.

2. In the case of *bonds or where the ancestor* (the original debtor) *binds his heirs*, &c. the declaration against the heir must also be in the *debet et detinet*: for as he is chargeable *jure suo* by virtue of the original contract from having assets descended to him, he shall be charged as for his own debt.

“ But as the heir is chargeable by reason of assets descended, he can discharge himself by shewing *that he had no assets by descent*; but he must shew this specially, or he “ will be bound.”

Barker v. Bourn.  
Co. Eliz. 692.

For where in debt against an heir on an obligation made by his ancestor, he let judgment go by default, and a *ca. sa.* issued against him, he brought error and assigned, that the execution should have issue against the *lands descended only*, and not against his person: but it was adjudged, that the judgment should be general as his own debt, unless where he acknowledges the action, and shews that he had so much only by descent.

“ And where the declaration is against the heir on the “ ground of assets, it must state him *as lineal or collateral heir* according as he is.”

Jenks's case.  
Cro. Car. 151.

For where in debt on a bond against the defendant, as *brother and heir of J. S. the obligor*, upon *riens per descent* in issue; it was proved, that J. S. was seized in fee and died seized, *leaving issue a son*, who died without issue, upon which the lands descended to the defendant *as heir to the son*; the court held that the verdict was found for the defendant; for he had nothing *as immediate heir to the obligor J. S.*: and if the plaintiff would charge him as collateral heir, he ought to have made a special declaration,

But

But where *A.* settled an estate upon himself for life, remainder to his eldest son in tail, remainder to his own right heirs, and entered into a bond and died, leaving two sons, *B.* the elder and the defendant; *B.* entered and died, leaving issue a son, who also entered, died without issue, and then the defendant entered: it was held that he might be charged as heir to *A.* for he took nothing from the nephew, but took as heir to him to whom the reversion in fee was affeys.

Kellow v. Rowden.  
Show. 244.  
3 Lev. 286.

But in debt against an heir, by an executor or administrator, on a bond of his ancestor, the declaration need not shew how he is heir, for the plaintiff being a stranger it would be hard to compel him to set out another's pedigree: but where the plaintiff *sues* as heir, he must set out his pedigree, for it is within his own knowledge.

Denham v. Stephenson.  
Salk. 354.

But though the declaration against the heir should be in the *debet & detinet*, yet if it be in the *detinet* only it will be cured by a verdict.

Comber v. Wotton.  
1 Lev. 224.

## 2. OF THE PLEADINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

1. "If the declaration is against an executor or administrator, it must be in the *detinet* only, for he is not personally liable, but only in respect of the testator's estate; he therefore cannot be said to *owe*."

1 Roll. Abr. 603.

It is held however in this case, that if debt is brought against an executor *for rent due in his own time*, that it must be in the *debet & detinet*. But in the report of the same case in *Cro. Eliz.* 711, I find that decision was reversed in the Exchequer Chamber.

Hargrave's case.  
5 Co. 31.  
Vide Salter v. Cobbold.  
3 Lev. 74.

However, after a judgment obtained against an executor, one may have debt in the *debet & detinet* suggesting a *devastavit*, and thereby charge him *de bonis propriis*; for being so liable to pay out of his own effects, it is properly his own debt.

Wheatley v. Lane.  
1 Saund. 216.  
1 Lev. 255.  
S. C.

2. In debt on a judgment against an executor suggesting a *devastavit*, the action may be laid either in *Middlesex*, where the judgment is entered, or in the county where the *devastavit* is laid to be: but if the defendant admits the judgment but traverses the wasting, that issue must be tried in the proper county.

King v. Burrell.  
Mich. 3 Geo. 2,  
C. B.  
Bull. N.P. 178.

And Note, That an administrator may be declared against as *assignee*, in debt for rent, for the time that he enjoyed the land and was in possession.

Buck v. Barnard.  
Show. 348.

9 Ed. 4, 47.  
1 Roll. Abr.  
917. A. 2.  
Salk. 302.

3. An executor may bring an action before probate, but he cannot *declare* till probate granted, for when he comes to declare he must produce his letters testamentary: but an *administrator* cannot bring an action till *administration granted*, for the power of the first is derived from the will, that of the latter from the ordinary.

Shepherd v.  
Shorthose.  
1 Stra. 440.

But if the probate has been lost, an exemplification from the ordinary will be sufficient.

Frewin v. Pen-  
ton.  
1 Lev. 250.

3. Declarations by executors or administrators must be in the *detinet* only; for a person can only be said to owe to the person to whom the money when received would belong, that is, to the *testator's* or *intestate's* estate, not to his executor or administrator.

“ And this is the case whether the action is founded  
“ on a contract or tort.”

Hitchcock v.  
Skinner & Lacy,  
Sheriffs.  
Cro. Eliz. 327.  
1 Roll. Abr.  
602.

As where it was in debt *for an escape against the sheriffs*, on a judgment obtained by the executors: the declaration, it was adjudged, should be in the *detinet*.

Spark v. Spark.  
Cro. Eliz. 840.

So where the action was debt *for rent*, it was resolved, that the declaration must be in the *detinet*; though the rent in this case was on a demise which commenced on the death of the testator, so that he never received any rent.

“ But where the executor *makes himself chargeable to the*  
“ *testator's* estate, there the declaration shall be in the *debet*  
“ *& detinet*.”

1 Roll. Abr.  
602.

As if he sells the goods of his testator and brings debt for the money: so if he takes a bond for a debt due to his testator; but if where the debt was due by bond to the testator he takes a fresh bond, but with an additional obligor and payable at the same time, this should be in the *detinet* only: for in such case he is not chargeable on his own account, as in the two preceding cases.

Morfoot v.  
Chivers.  
1 Stra. 631.

4. In actions by an executor the declaration should state “ *That the testator was dead, and he compleat executor.*” But if the executor has recovered and had judgment, and afterward brings a *scire facias* on it, such averment is not necessary, though it would be otherwise had the *scire facias* been on a judgment obtained by the testator himself; for by the first judgment the executor's right was established, but where the first judgment has been by the testator

the executor's right does not appear without such averment.

5. So a declaration by an administrator is good, stating in general, "*That administration was granted to him by the bishop of, &c.*" without saying that he was ordinary, or to whom the right of granting administration belonged: but if it is a peculiar jurisdiction, that should be so set out. And the reason is, that the defendant might contest the right of the person granting administration, or shew that administration was granted to another, or that there were *bona notabilia*; but a verdict would cure the fault. Skidmore v. Winston.  
Cro. Eliz. 879.

6. In a declaration by an executor of an executor, he should set out, "*That the first executor proved the will*;" for otherwise the plaintiff has no title; for if there had been no probate granted to the first executor, an *administration cum testamento annexo* should be granted of the effects of the first testator to the next of kin: but this would be cured by a verdict. Gradell v. Tyfon.  
2 Stra. 716.

7. An executor should not join in the same declaration a demand by his testator, and in his own right, or the writ will abate; for the judgments would be different: that on the first would be *de bonis testatoris*, that on the latter *de bonis propriis*. Hooker v. Quilter.  
2 Stra. 1271.  
1 Will. 171.  
S. C.

#### 4. OF THE PLEADINGS BY AND AGAINST BARON AND FEME.

1. For a debt due by the wife *dum sola*, as on a bond made by her before marriage, the declaration must be *against husband and wife in the debt & detinet*: for as by the intermarriage all the chattels of the wife belong to the husband absolutely, he is chargeable on that account with all her debts. Walcot's case.  
5 Co. 36. a.

2. For personal things in action, as a bond to the wife *dum sola*, the husband may bring the action *alone*, or join the wife as he thinks fit. Cro. Eliz. 133.  
Howell v. Main.  
3 Lev. 403.

And Note. That though the wife is under age, yet the husband and wife may bring this action, and appear by attorney: for the husband by law may make an attorney, and appear both for himself and his wife. Mumfry v. Vaughan.  
Show. 13.

## 5. OF THE PLEADINGS BY OR AGAINST ASSIGNEES.

1. " If the action is brought by the assignee of the reversion against the lessee for rent, he must set forth the seisin in fee in the first tenant, and the several mesne assignments, down to himself: for these are necessary to make out his title, and the validity of these assignments being matter of law, ought to be set forth for the court to judge of."

Co. Litt. 303.

For it is a general rule, that estates in fee-simple may be alledged generally, but the commencement of estates tail, and other particular estates, must be shewn *where they go to the ground of the action*; but not so where they are *only inducement*. And so the life of the tenant of tail or for life ought to be averred.

Cotes v. Wade.  
1 Lev. 190.

Pitt v. Russell.  
3 Lev. 19.  
S. P.

2. But where the action is by the lessor or his heir, *against the assignee of the lessee*, the plaintiff need not set out the several mesne assignments to the defendant, for they do not lie within his knowledge: but it is sufficient for the plaintiff, to set forth the original demise to the first lessee, whose estate and interest has by several mesne assignments come to the defendant; and proof of possession and occupation shall be sufficient to charge him.

## 2dly, OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

With reference to the contract, and with reference to the person.

1st, As to Bonds. 2dly, As to Rent. 3dly, As to Judgments. 1st, The Pleas applicable to each. 2dly, Such as are applicable to all.

## I. OF THE PLEAS AS TO BONDS, WITH REFERENCE TO THE CONTRACT.

These are, 1st, Pleas to Bonds in general. 2d, Non est factum. 3d, Nil debet. 4th, Solvit ad diem. 5th, Accord and Satisfaction. 6th, Foreign Attachment. 7th, Pleas to Bonds of Indemnity.

## I. Of



## 1. Of Pleas to Bonds in general.

1. "As to which it is a rule, that no *parol averment* "varying the condition of a bond, shall be admitted as a "plea."

As where to debt on a bond, the defendant pleaded, Hayford v. Andrews. Cro. Eliz. 697.  
 "That before the day of payment, in consideration of a trespass done to him by the plaintiff's beasts, that the plaintiff *had given to him a longer day for payment, which was not yet come.*" On demurrer the court held the plea ill, for no agreement by parol can dispense with an obligation.

So if the bond is delivered *to the obligee himself*, the obligor cannot plead "that the delivery was not absolute, but conditional:" for that would be variant from what appears on the face of the bond, which is absolute. Whyddon's case. Cro. Eliz. 520. Holford v. Parker. Hob. 246.

So where to debt on a bond conditioned for payment at a day certain, the defendant pleaded, "That the bond was not absolute, but given to indemnify the plaintiff's testator against another bond, and *non-damnific.*" on demurrer, the plea was held to be bad, for it was giving parol evidence to abate a deed. Meafe. Cowp. 47.

"But when the obligor has entered into a bond for payment of money absolutely, he may yet be discharged by a subsequent *instrument in writing.*" Bro. faiths. 10. Dr. and Stud. Ch. 10.

As where to debt on a bond, the defendant pleaded, Hodges v. Smith. Cro. Eliz. 623.  
 "That after the obligation, the plaintiff *by his indenture covenanted*, that upon payment of 100*l.* that the first obligation should be void:" it was demurred for cause that the indenture being made after the bond, it could not be pleaded in bar thereof, but should be taken advantage of by covenant, and that it should not enure by way of defeasance or release: but the court held it well pleaded in bar, and that circuity of action was to be avoided.

"But in such case, it seems that such instrument should appear as *intended to operate as a defeasance of the first obligation*, as to say, 'that on payment, &c. the first obligation should be void.'

For where there are no such words, it was held that a bond given at a subsequent day could never be pleaded in bar to one given before. Manhood v. Crick. Cro. Eliz. 716.

"But

Cro. Eliz. 520. "But where the bond has not been delivered to the  
Co. Litt. 65. a. "obligee himself, but to a stranger, there the defendant  
"may plead any parol matter, as that it was delivered con-  
"ditionally, or as an escrow: for delivery is one of the  
"essentials to a deed, and it is not good and recoverable  
"unless it has been delivered to the obligee himself; without  
"which it is no deed."

Anon. 1. And therefore where the defendant so pleads the deli-  
Vent. 9. very as an escrow, he should shew to whom he so delivered  
Ward v. Forth. it, and conclude & *issint nient son fait*, as such conclusion  
2 Vent. 10. is good according as the delivery has been to the obligee  
himself or to a stranger. And so where the defendant  
only pleaded a delivery to T. S. "*et hoc parat. est verificare*,"  
the plea was held to be bad; for it is a special *non est*  
*factum*, and so should have concluded to the country.

Watts v. Relfe- For where the defendant pleads delivery as an escrow,  
well. and *sic non est factum*, the plea should conclude to the coun-  
1 Salk. 274. try, and not with an averment; for it is a special negative  
of the affirmative in the declaration, and the general con-  
clusion (*sic non est factum*) waives the special matter preced-  
ent, which would have made an averment necessary.

"In one instance, modern practice has admitted an ex-  
ception to the rules now laid down, that is in the case  
of Trusts."

Rudge v. Birch. For the courts of law now take notice of Trusts, and  
Mic. 25 G. 3. will allow a plea not consistent with the bond. As that  
1 Term Rep. the plaintiff, the nominal obligee in the bond, is not the  
622. real owner of it, but merely a trustee for another.

Winch. v. Therefore where a bankrupt had assigned his interest in  
Keeley. a debt, by a deed-poll to a third person, he was notwith-  
Hill. 27 Geo. 3. standing allowed to bring his action for the benefit of the  
1 Term Rep. person to whom he had made the assignment, and recovered;  
619. for the statute 1 Jac. 1. c. 15. only gives to the assignees  
such things in which the bankrupt has a beneficial interest,  
which in this case he had not, being merely a trustee for  
another.

Bottomley v. So that the point seems now to be settled. The first  
Brook. case in which it occurred was this: To debt on a bond,  
Mic. 22 Geo. 3. the defendant pleaded, "That the bond was given to the  
C. B. plaintiff for securing 100*l.* lent to the defendant by one  
1 Term Rep. E. Chancellor, and was by her direction made to the plain-  
621. tiff in trust for her, and that E. Chancellor was now indebted  
to the defendant in more than the amount of the bond."  
To this was a demurrer; but it was withdrawn by advice  
of the court.

2. "But though the defendant is estopped to plead any matter contrary to the bond, yet he may plead a plea, which admitting the bond, yet shall avoid it, as *that the consideration was illegal. ex. gr.*"

For where in this case it was attempted to be supported, that the defendant was estopped by his deed to plead any thing *dehors* to avoid it (as here, "That it was given to compound a prosecution for perjury") the court held, that the estoppel only went to prevent the party from pleading any thing *contrary to the deed*; but this plea admitted and avoided it. And in this case the plea should conclude, "that therefore the bond was void," not with a *non est factum*. Collins v. Blantieri.  
2 Will. 344.

## 2d. Of the Plea of Non est Factum.

This is to be pleaded under these limitations :

1. If the bond be void in itself, but that does not appear *on the face of the deed*, but depends on something extrinsic (as if made by an infant or person non compos) in that case *non est factum* is a bad plea. For the court can only judge from what is before them, and the bond on the face of it appears to be good. Such also is the case of *duress*, which must be pleaded. Thompson v. Leach.  
Salk. 675.

2. So where a bond or other instrument is by an act of parliament enacted to be void, the obligor cannot plead *non est factum*; but the special matter should be pleaded, and advantage taken of the statute. And if the bond was given on an *usurious consideration*, the statute must be pleaded. Whelpdale's case.  
5 Co. 119.  
Lord Bernard v. Saul.  
1 Stra. 498.

So if the bond was given for a gaming debt, the statute should be pleaded. And in this case the defendant in his plea should set out the game played at, and conclude *contra form. stat.* that the court may see that it was within the statute. So in pleading simony the agreement must be shewn. Colborne v. Stockdale.  
1 Stra. 1494.

3. But if a bond never was compleat by delivery, as if delivered to another to the use of the obligee, and being tendered, he has refused it, whereby the delivery has lost its force; or if made to a *feme covert*, and the husband has disagreed to it; in these cases the obligor (defendant) may Whelpdale's case.  
5 Co. 120.

Markham v.  
Gonaston.  
Cro. Eliz. 626.

may plead *non est factum*. So though it was once his deed, yet, if before action brought, it becomes no deed, either by rasure, interlineation, alteration, or breaking off the seal; in these cases the defendant may plead *non est factum*.

Michael v.  
Scockwith.  
Cro. Eliz. 120.

For this plea of *non est factum* is in the present tense, and therefore if true at the time, the plaintiff (the obligee) cannot recover, but if the deed was good when the plea was pleaded, but after issue joined the seal was pulled off, or the deed cancelled, yet shall the plaintiff recover.

Henry Pigot's  
case.  
11 Co. 26.

And *Note*, That though rasure in general shall avoid a deed, if made by the obligee, or a *stranger*, without his privity, in a *part material*, or by himself, in a part not material; yet an alteration by a stranger in an *immaterial part* will not avoid a bond, if done without the privity of the obligee.

4. "From these cases it appears, that on the plea of *non est factum*, questions of fact only arise, as the non-delivery, rasure, &c."

Colton v. Good-  
ridge.  
2 Black. Rep.  
1108.

But where the condition is void in law, the defendant in such case should not plead *non est factum*, but pray oyer and demur, if the illegal condition appears on the face of it: if not, plead the special matter to avoid it.

Ball v. Dunster,  
80 alt.  
4 Term Rep.  
313

5. Though a deed should regularly be executed by the party, against whom an action is brought either in his own person, or under a power of attorney; yet where one of the defendants, *in the presence of the other and by his authority* executed the instrument for both, they being partners in the transaction, the court were clearly of opinion, that no particular mode of delivery was necessary; but that it was sufficient if the party executing a deed treated it as his own, particularly, as in this case it was executed in his presence.

### 3. Of the Plea of Nil Debet.

Anon.  
2 Will. 10.

*Nil debet* cannot be pleaded to debt on a bond. This was so held on general demurrer; for the bond acknowledges a debt, and so there is an estoppel.

## 4. Of the Plea of Solvit ad Diem.

1. "It was formerly the case in debt on a bond, that as the money was to be paid according to the condition at a day certain, if the money was not paid at the day, that the bond was forfeit, nor could the defendant under this issue prove payment after the day: But it is now enacted by statute 4 & 5 Ann. c. 16. §. 12. "That where debt is brought on any single bill, bond, or judgment, if the money has been paid, though neither at the day or place, yet if paid at a subsequent day, such payment may be specially pleaded."

But if the defendant has paid the money before the day, he may, to debt on a bond conditioned to pay at a day certain, plead *solvit ad diem*, and give in evidence payment before the day, as he could not plead it; for if the defendant was to plead payment before the day the issue would be immaterial, for it still left the presumption open that there might be payment at the day. And therefore a difference is to be observed between pleading where the condition of the bond is to pay at a day certain, and where at or before such a day: for to the first the defendant may only plead payment at the day, for the reason now given; and beside, that the performance of a condition ought to follow the terms of it: but to a bond payable at or before such a day, the defendant may plead payment before the day, viz. on such a day, for it is within the condition. And therefore where it was so pleaded, and the defendant demurred to it as an immaterial issue, the court over-ruled the demurrer, and laid down the rule to be, "That where the defendant pleads performance of the condition, the plaintiff must assign an absolute breach, though it is not necessary where he pleads a collateral matter (as a release): and that therefore where the defendant had pleaded payment before the day, the plaintiff should have replied, That the money was not paid at the day mentioned in the plea, nor at any time before, on, or after that day." For by such issue alone can the payment be tried.

Winch v. Perdon.  
Mich. 1 G. 1.  
Buller N. P.  
174.

Tryon v. Carter.  
2 Stra. 994.  
Fletcher v.  
Hennington.  
2 Burr. 944.  
1 Black. Rep.  
210. S. C.

"But under the statute nothing but an absolute payment after the day is pleadable."

Therefore a tender and refusal of principal and interest at subsequent day cannot be pleaded in bar, as not being within the equity of the statute; for such construction

Underhill v.  
Matthews.  
Pasch. 1 Geo. 1.  
C. B.  
Buller N. P.  
171.

Q

would

would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

1 Burr. 434.

Gowp. 109.

2. "If no interest has been paid on a bond for twenty years, it shall be in law presumed to be satisfied; and in such case the defendant may plead *solvit ad diem*, and rely on the presumption: and Lord Raymond has left it to the jury on sixteen years, where there were circumstances to fortify the presumption."

"Wherever therefore the defendant relies on this presumption of payment, the *onus probandi* lies on the plaintiff, to prove payment of interest after the day, to rebut the presumption."

Morland v. Bennet.  
1 Stra. 562.

For where in debt on a bond of thirty years standing the defendant pleaded *solvit ad diem*, and relied on the presumption, the plaintiff proved payment of interest two years after the thirty, but could prove none paid for the last twenty-eight years. Lord Raymond held, that this plea was to be taken strictly (that is here, "paid thirty years ago") and that the plaintiff having falsified the defendant's plea, by proving the payment of interest two years after, was entitled to judgment: but that the defendant should have pleaded, Payment *after the day*, under the statute; in which case the presumption would have been in his favour.

It is for this reason now usual in cases of this nature, to plead *solvit ad diem*, and *solvit post diem*, which takes in the whole time to twenty years.

"This plea when founded on the presumption is by the court taken strictly, and though they allow the presumption of twenty years to be *of itself* sufficient, yet if the time falls any thing short of that, they will require other circumstances to fortify the presumption of payment; as *ex. gr.* if an account had been settled between the parties, and no notice taken of the demand, that should be deemed a circumstance to shew that nothing was due."

Ofwald v. Leigh.  
1 Term Rep.  
270.

And in this case, where the bond was of nineteen years and a half standing, but no circumstances to induce a presumption in its favour, it was held to be no bar.

"These circumstances (as to the time of payment of interest, being within twenty years) being matter of fact are proper evidence to be left to the jury to decide."

For where to debt on a bond, the defendant pleaded *solvit ad diem*, and relied on the presumption of non-payment of interest for twenty years, the plaintiff offered in evidence an indorsement on the back of the bond, being a receipt for interest on it *ten years before the presumption accrued*: this evidence was refused by the Chief Justice, on the ground that it was the act of the obligee himself, and so should not be admissible evidence; but the court granted a new trial, for it was proper evidence to be left to the jury, whether the indorsement of the receipt of the money had not been made with the privity of the obligor, particularly as a receipt given in that manner is usual, as more safe than on a loose piece of paper. On a new trial the evidence was admitted, and the plaintiff recovered.

Searle v. Lord  
Burrington.  
2 Stra. 826.  
2 Ld. Raym.  
1370. S. C.

But where similar evidence of the indorsement of the receipt of part of the bond was tendered, but appeared to have been made *after the twenty years elapsed*, it was rejected as inadmissible evidence: and the Chief Justice took the distinction, that in the preceding case the indorsement was admitted, because it appeared to have been made at a time when it could not have been thought necessary to encounter the presumption; but this was made after the presumption had incurred.

Turner v.  
Crisp.  
2 Stra. 847.

“And it has been held sufficient to obviate the presumption to shew a claim or demand of the money.”

As where the plaintiff shewed two writs of *testatum capias* sued out by him before the twenty years run but not served, because defendant could not be found. Lord Mansfield in this case said, there was no ground for the presumption.

Moyle v. Lord  
Roberts, quot.  
1 Term Rep.  
271.

3. “Under this issue of *solvit ad diem*, what shall be deemed a payment where the defendant is indebted to the plaintiff in different demands, often comes in question. Upon which these points have been settled:

“1. That *he who pays the money* has a right to direct to what purpose it shall be applied.”

For where the defendant was indebted to the plaintiff in money on a bond, and also for wares sold, and at the day of payment he tendered the money on the bond. The plaintiff took the money, and said he would apply it to the payment of what was due for the wares; but the defendant said he paid it on account of the bond: the plaintiff afterwards sought debt on the bond, and it was adjudged against him; for the payment is to be according to the manner

Anon.  
Cro. Eliz. 68.

the defendant would pay it, not as the plaintiff would receive it.

2 P. Wms. 308. Therefore where the point turned on payment of earnest, on which the plaintiff relied, and the defendant had pleaded, *that he did not accept or receive it as earnest*, the plea was over-ruled; for it was not material how the defendant received it, but how the plaintiff paid it, for *quicquid solvitur, solvitur ad modum solventis*.

2. " But there seems to be some diversity in the decisions at law and in equity, where the debtor makes a payment *generally*, without appointing how the money is to be applied."

Heyward v.  
Lomax.  
1 Vern. 24.

In equity it has been held, that if a man owes another money on a security bearing interest, and on another bearing none (as by mortgage and simple contract) and he makes a general payment, without mentioning whether it is to be applied to one demand or the other; that it shall be taken to be paid in discharge of the mortgage, for it is natural to suppose, that a man would elect rather to pay off money bearing interest than that which carried none.

Perris v. Roberts.  
1 Vern. 34.

So where the plaintiff was bound as a surety for J. S. in a bond to the defendant, and J. S. was also indebted to him on simple contract; and they came to a settlement, in which it appeared that J. S. was indebted on the balance of account in 8*5*l. in satisfaction of which J. S. made to the defendant a bill of sale of his effects: it was decreed, that the effects should go to pay both demands in equal proportions, and not to be applied to one demand more than to the other.

" The decisions at law have varied from these; for there it has been held, that if the payer of the money does not appoint to what demand it is to be applied, that the receiver may do it."

Goddard v. Cox.  
2 Stra. 1194.

As where one Owen was indebted to the plaintiff for coals; he died and made his wife executrix, who also became indebted to the plaintiff on her own account, and then married the defendant, who continued to deal with the plaintiff, and made several payments on account. These sums, if applied to the debt contracted by the wife while sole, and that due as executrix, would discharge both, and the defendant having given no directions how the payments were to be applied, the plaintiff insisted on applying them to pay those debts, and brought his action for the coals furnished to the defendant in his own time. The Chief Justice was of opinion, that as the defendant

had



had not directed the application of the payments, that the right devolved to the plaintiff, who might apply them to the wife's debt while sole; but as to the demands against her as executrix, as these depended upon assets and the manner of administering, the plaintiff could not apply them to that demand.

"It is however to be observed on this case, that though the general doctrine is there laid down, That where the payer does not appoint, that the receiver may; yet this case may well stand with the former, for the demands in this case were of the same nature, both simple contract debts; so that it made no difference to the defendant in what manner the money was applied, which it would do where one demand bore interest, and the other did not."

So in this case, where the defendant owed money on two bonds, and paid money on account, but gave no direction to which he would have it applied; the case was reserved, and it was determined, That the plaintiff had the election to which to apply it. *Blois v. Cutting*, 2 Stra. 1194.

"And here it is again observable, that the securities were of the same nature, nor was it of consequence (as far as appears) to which bond the payment was applied."

3. "But if there is any relation between the fund from which the payment is to arise and the security, the fund shall direct the appropriation of the payment."

As where the defendant was an incumbrance on an estate by judgment, and had also a debt by bond, and received 200*l.* of the purchase of the estate in part, but gave no notice to the purchaser that it was to be applied to the payment of the bond debt: it was decreed to be applied towards satisfaction of the judgment, the 200*l.* being part of the purchase-money of the estate affected by the judgment. *Brett v. Marth*, 1 Vern. 468.

## 5. Of the Plea of Accord and Satisfaction.

1. This plea must have two qualities: 1<sup>st</sup>, It must be such as the party agrees to accept, and be so pleaded: 2<sup>dly</sup>, It must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear.

"As

**Paine v. Masters**  
1 Sira. 573. “As to the first, the defendant should plead that he paid such a sum of money, &c. in full satisfaction of the demand, and that the plaintiff accepted it as such.”

**Hawkshaw v. Rawlings.**  
1 Sira. 23. For it is not sufficient to say only that the plaintiff accepted it as satisfaction, unless paid by the defendant as such. Nor is it sufficient that the defendant so paid it, unless the plaintiff accepted it as satisfaction.

“So in the second case, it should appear that the satisfaction was a *good and valuable one*, and it should therefore be set out what it was.”

**Preston v. Christmas.**  
2 Will. 86. For where to debt on a bond the defendant pleaded an accord and satisfaction, viz. *a release by him of an equity of redemption* of certain premises mortgaged by him to the plaintiff, in lieu of all bonds, &c. On demurrer the plea was held to be bad; for an equity of redemption is of no value in the eye of the law, according to *Littleton, section 332*.

“And for this reason the satisfaction must appear to be *complete and executed*.”

**Balston v. Baxter.**  
Cro. Eliz. 304. For where to debt on a bond, the defendant pleaded payment of part before the day the bond became due, and *a promise to pay the rest at a day to come*, to which the obligee had agreed: it was held to be no bar, for it was executory.

**Sir Richard Lovclace v. Cocket.**  
Hob. 68. And therefore one bond cannot be pleaded in bar of another, for that is of no greater value, unless the security or circumstances are bettered; as by shortening the time of payment.

**Norwood v. Gripc.**  
Cro. Eliz. 727. And the *bettering the security* alone is not sufficient; for a bond *with sureties* is better than a single bond, and yet the former cannot be pleaded in bar to the latter.

**Finnel's case.**  
3 Co. 117. 2. For the same reason *payment of a lesser sum at the day* can never be pleaded in satisfaction of a greater, because by no possibility can it be a satisfaction: *but the gift of a thing of less value but different in quality*, as of an horse or of a robe, &c. may well be pleaded in satisfaction: for these may be as beneficial to the party and valuable as the money.

**S. C.** So payment of a *lesser sum before the day* may be well pleaded in satisfaction: or if the *money is to be paid at York*, and the party takes a *lesser sum at London*, that may be well pleaded in bar; for payment of a lesser sum before the day or at a different place, may be of more value to the obligee than

than the whole when due, or at the place where it was to be paid.

3. *As to the form of the plea*, the defendant should plead the accord and satisfaction of the money due by the bond, and not of the bond itself: for a bond being a deed, shall only be discharged by a deed: but the payment of the money may be discharged by matter *in pais*. And if a man acknowledges himself satisfied by deed, it is a good bar without any thing received.

Preston v. Christmas.  
2 Will. 86.  
2 Ref.  
Blake's case.  
6 Co. 43.  
Cro. Jac. 254.  
5 Co. 117. b.

## 6. Of the Plea of Foreign Attachment.

"That the debt has been attached in the defendant's hands by *foreign attachment*, is another good plea to debt on a bond."

Upon which these decisions have taken place:

1. "That after the plaintiff has commenced his action in the courts above, and the defendant appeared, the debt cannot be attached in the defendant's hand at the suit of any other person."

For where the defendant pleaded a foreign attachment of the debt in his hands, *after appearance in the court above*, it was ruled to be a bad plea.

Babington v. Babington.  
Cro. Eliz. 157.

"But a creditor may attach the debt due to his debtor while the creditor's suit is depending against him in the courts above; and shewing such matter will be a good plea in bar."

For where to debt on a bond the defendant pleaded, That the debt due by him to the plaintiff had been attached in his hands in *London* by one *Faques* the plaintiff replied, That before the attachment, *Faques*, had brought an action in Common Pleas against him for the same debt, and made the attachment pending the suit. On demurrer, it was resolved that the creditor of the plaintiff might well make such attachment, for that the plaintiff in an action might also levy a plaint whereon to ground an attachment while the suit above was pending, and that it therefore was a good plea in bar.

Lenknor v. Huntley.  
Cro. Eliz. 593.

2. A debt cannot be attached by foreign attachment before it is due, though the judgment on the attachment is not till after it become due: and therefore if the defendant was to plead the attachment, the plaintiff might reply this

Dalton v. Selly.  
Cro. Eliz. 184.

this matter, that it was made before the money became due, and have judgment.

Sir John Perrot's case.  
Cro. Eliz. 63.

3. A debt upon record by recovery, cannot be attached by the custom of London.

Grant v. Hawding.  
Hill. 7 Geo. 3.  
In mot.  
4 Term Rep.  
313.

Therefore where a cause had been referred to an arbitrator, by an order of *Nisi Prius*, who awarded a sum to be paid by the defendant to the plaintiff on a certain day: at that day some of the creditors of the plaintiff attached the debt in the defendant's hand, and he paid the money to the creditors: it was resolved, that the rule of *Nisi Prius* having been made a rule of court, that this must be considered as a sum of money ordered to be paid by the court, and so could not be attached; and that the defendant should not be allowed the payment of it as against the plaintiff.

Coppell v. Smith  
4 Term Rep.  
312.

So where a judge's order had been made to tax the plaintiff's attorney's bill, the plaintiff undertaking to pay what was due, and the master's *allocatur* amounted to 30*l.*: before the attorney had demanded the money, a creditor of his attached it in the plaintiff's hands; it was held to be erroneous, and that money so awarded under a rule of court could not be attached.

4. "If the defendant pleads a foreign attachment, it should appear that the plaintiff in this action had notice of the proceedings in London to effect the foreign attachment; for as his property in the hands of his debtor, is to be bound, he should be made a party, and have notice."

Fisher v. Lane.  
3 Will. 297.

For in this case where to an action for goods sold the defendant pleaded the general issue, and gave in evidence a payment under a judgment on a foreign attachment at the suit of one *Fanson*, to whom the plaintiff was indebted; but it appeared that no notice had been given to the plaintiff: for that fault he had judgment. This case was that of an administrator, but the principle seems to be general.

## 7. Of the Pleas to Bonds of Indemnity.

Holland v. Mal-  
kin, & alt.  
Will. 126.

To debt on a bond to save harmless, the defendant only can plead, either that he has saved the plaintiff harmless, or that if he has received any injury, it was through his own default.

And

And where the defendant pleads that he has saved the plaintiff harmless, he should shew *how he had done so*. But as the saving harmless is the substance, and *how* matter of form, the plaintiff should take advantage of the defect in the plea by *special demurrer*. White v. Cleaver.  
1 Stra. 681.

And note, That bonds are within stat. 4 & 5 Ann. c. 16. Dunn v. Vacher which allows the defendant to plead double; and these pleas & ux. following have been allowed. Where the condition of the bond was to marry on request, *non est factum*, and *never requested*, were allowed to be pleaded together. 2 Stra. 907.

So *non est factum*, and a discharge under a commission of bankrupt, were allowed to be pleaded together. Atkinson v. Atkinson.  
2 Stra. 871.

But *non est factum* and *solvit ad diem* cannot be pleaded together, for they are incompatible. Arnold v. Baas.  
2 Black. Rep. 993.  
Co. Litt. 47.

## 2d. OF THE PLEAS IN DEBT FOR RENT.

These are, 1st, *Nil habuit in tenementis*. 2d, *Non dimisit*. 3d, *Nil debet*. 4th, *Riens en arriere*. 5th, *Entry and eviction*. 6th, *The statute of limitations*. 7th, *Infancy*.

### 1st. Of the Plea of Nil habuit in Tenementis.

In debt for rent reserved by deed indented, the defendant never can plead that the plaintiff *nil habuit in tenementis*; for he is estopped by his deed, which admits the demise. But *if* the demise been by the lessor by deed-poll, lessee might so plead, for the deed is no estoppel as to him. Heath v. Vermeden.  
3 Lev. 146.

### 2d. Of the Plea of Non dimisit.

So neither can he plead *non dimisit* where the rent is reserved by indenture, for there too is an estoppel; though for rent reserved by parol, he might so plead. Ibid.

### 3d. Of the Plea of Nil debet.

1. "In all cases where the debt is founded on the deed, the plea cannot contradict it: but where the deed is the inducement 2 L. Raym. 1503.

Arg.  
Hard. 352.

ducement and matter of fact the foundation of the debt, there is some diversity." Therefore the defendant to debt for rent reserved by indenture may plead *nil debet*, which in the case of a *bond* he could not do: for an indenture of lease does not acknowledge an absolute debt as a bond does, as the debt arises from the *enjoyment of the thing demised*, and so is but inducement.

8. C.

So the defendant may plead *non est factum*; for denying the existence of the deed there can be no estoppel.

3 Lev. 145.  
Kemp v.  
Goodall.  
Salk. 277.

2. But tho' the defendant may plead *nil debet*, yet he cannot give in evidence under it *that the plaintiff had nothing in the tenements*; because had he pleaded it specially, the plaintiff could have replied the indenture, and estopped him; or the plaintiff might demur; for the declaration being on the indenture, the estoppel appears on the record.

Co. Litt. 373. a.  
3 Co. 65. b.  
1 Sid. 44.

3. If the lessor accepts rent due at the last day of payment, and gives a discharge thereof and acquittance, this shall discharge all preceding arrears: So that such would be good evidence on *nil debet*; for it is not presumable that a man would give a receipt for the last gale of rent, when the former were unpaid.

Galloway v.  
Sufach.  
1 Salk. 284.  
Sir Th. Cecil v.  
Harris.  
Cro. Eliz. 240.

So if the defendant pleads *levied by distress*, and so *nil debet*, he may give in evidence a release or payment; and even though there never was any distress made, yet is the evidence of payment or the release good; for *the issue is on the debt*: and the defendant proving it discharged by any means, supports his issue.

Taylor v. Bayle.  
Cro. Eliz. 222.

4. So if the lessor had covenanted by deed to repair; to debt for rent by the lessor, the lessee may plead "That he expended the rent in necessary repairs, and so owes nothing; which it seems by law he may do (though it was doubted by Lord Holt, 1 L. Raym. 420. *ideo quære*); but the defendant must plead this special matter, and cannot give it in evidence on the general issue, for he might have covenanted on it against the lessor: But under the general issue the defendant may give in evidence *that he paid the rent to persons who had rent-charges out of the land*, by the command of the lessor; for payment by the plaintiff's appointment, is payment to himself.

Johnson v.  
Carre.  
1 Lev. 152.

But where there is an express covenant in the same indenture that the lessee may deduct for charges and repairs, there clearly the defendant may plead it in bar to debt for rent.

4th. Of the Plea of *Riens en Arrere*.

"*Riens en Arrere* is a good plea in debt for rent, though Theobald v. it would be bad in covenant for rent" (*Hare v. Saville*, Warner. 1 Brownl. 9.); for in covenant such plea confesses the Cowp. 588. covenant broken, and goes only in mitigation of damages.

Under this issue the payment comes in question, and Buller N. P. proof by the defendant that *he had given a bond for the* 182. rent to the landlord, which he had accepted, will not 3 Darr. 507. amount to a payment; for the accepting a security of an equal degree is no extinguishment of a debt (*ante*, 230) and therefore cannot be so here, where the rent is due on a lease, which is an higher security than by bond. *Vid. post. Godfrey v. Newton*.

And *a fortiori* it is bad proof of *riens en arrere*, that the Harris v. Ship- lessor accepted the lessee's note of bond for the rent in arrear, way at Mon- for such can never be a discharge of the rent. Here the mouth, 1744, lessor having taken such note, afterward distrained, the les- per Abney. see brought trespass, and had judgment against him; for Bull. N. P. 182. there was no alteration in the debt till payment of the note, so that the distress was lawful.

## 5th. Of the Plea of Entry and Eviction.

"*Entry and Eviction* of the whole or any part of the pre- 7 Hen. 6. 26. mises demised, is a good plea in bar to an action of debt a for the rent."

But a mere entry is not sufficient to cause a suspension of Hunt v. Cope- the rent, for such may be merely a trespass, and shall be Cowp. 242. so deemed: but it must be a tortious *entry and expulsion* so as to prevent an enjoyment of the premises. And therefore in this case, where the lessee pleaded in bar that the lessor entered on the premises and pulled down a summer-house, whereby the lessee was deprived of the use thereof, without saying that he was expelled or put out of the use of the same, it was held to be bad, as not shewing any eviction, so as to cause a suspension of the rent.

"For the *expulsion* must be specially pleaded."

Therefore where the defendant pleaded only, that before Reynolds v. the rent was due that the plaintiff *had entered* on the pre- Buckle. mises, but did not say that he had *expelled* or *kept him out of* Hob. 396. possession, the plea was adjudged to be insufficient for that reason.

## 6th. Of

## 6th. Of the Plea of the Statute of Limitations.

*The statute of limitations* is another plea, and is given by stat. 21 Jac. 1. c. 16. which enacts, "That all actions of debt for rent arrear, or grounded on any lending or contract without specialty, must be brought within *fix* years."

Freeman v.  
Stacye.  
Hutt. 109.

But this only extends to rent due on a *parol demise*; for arrears due on an *indenture* of lease are not within the statute.

Neither is the statute pleadable to any thing but debt on simple contracts: for bonds are only barred by the twenty years and presumption (*ante*, 226).

• "And to matters of record it is not pleadable."

Jones v. Pope.  
1 Saund. 37.

For in debt against a sheriff, it was held that for money levied under an execution he could not plead the statute; for though it is not a record till the writ is returned, yet it is founded on a record, and hath a near relation to it.

## 7th. Of the Plea of Infancy.

"*Infancy* is another good plea in debt for rent; but a *lease made to an infant* is not void, but *voidable* only at his election on his coming of age: and if he does not then avoid it, but continues in possession, he is chargeable for the rent."

Ketley's case.  
Cro. Jac. 320.

Therefore where to debt for rent the defendant pleaded infancy at the time of the lease made; on demurrer the court held, that the lease was voidable only at the election of the infant, by waiving the land before the rent-day came; but he not having done so, and being of age before the rent-day came, it was deemed an election; and the plaintiff had judgment.

## 3. OF THE PLEAS TO DEBT ON MATTERS OF RECORD.

1. Where debt is brought on a judgment, *nul tiel record* the proper plea. And the issue is tried by producing the record.



record itself, if it be a record of the same court; but if of Hewson v. another court, it must be certified into the court where the Brown. action is brought, by *certiorari*. 2 Burr. 1034.

2. So to debt against a sheriff on an escape on final process, *multi record* is a good plea; for in such case the plaintiff declares on a judgment. In this case the plaintiff demurred to this plea, supposing that it should have been *nil debet*; but it was held to be good. Maddox v. Young. Hob. 209.

But where a *fi. fa.* has issued to the sheriff who has levied the money but not returned the writ, and the plaintiff brings debt for the sum levied, the defendant may plead *nil debet*; because it is then a matter of fact whether the money has been levied or not: but it is a bad plea if the writ has been returned, for then he is bound by the return. Cole v. Acorn. Cal. K. B. 604.

3. In debt on a bail-bond the defendant *cannot traverse the arrest of the principal*; for so all bail-bonds that are civilly taken (that is, so as not to expose the party by an arrest) would be avoided. Watkyns v. Parry. 1 Stra. 444.

"But the defendant may traverse the issuing of the writ on which the principal was stated to have been arrested and held to bail."

For where in debt on a bail-bond, the declaration stated that a bill of *Middlesex* issued, upon which *I. S.* had been arrested, and that the defendant had entered into the bail-bond; the defendant pleaded that such a bill of *Middlesex* did not issue, and on demurrer the plea was held to be a good one; for if no such bill of *Middlesex* issued, the bail-bond was void, and the plaintiff had no cause of action. Saxby v. Kirkus. Sayer's Rep. 116.

So to debt or on *scire facias* against the bail, "That the principal had paid the money," is a bad plea, except it be pleaded on record: for the condition is, "That the defendant (the bail) should surrender the body or satisfy the debt;" and this must be by the most sufficient satisfaction, that is by record. Ordway v. Parret & al. Cro. Eliz. 132.

In a *scire facias* against the bail, it was held that where the principal lay in gaol for two terms; and so might have been discharged by a rule, yet that where afterwards a declaration was delivered and judgment had thereon, that it was good to charge the bail. Dodd v. Dawson. 2 Vent. 142.

2. These are the most material pleas distinctly applying to the several heads of bonds, leases, and matters of record. There are also others which are equally applicable to each of these heads, which now remain to be considered.

These

These are, 1st, A set-off: 2dly, A release: 3dly, A discharge under an insolvent act or bankrupt certificate.

### 1st. Of the Plea of a Set-Off.

This was first given by stat. 2 Geo. 2. c. 22. which enacts, "That where there are mutual debts between the plaintiff and the defendant, or if either party sue or are sued as executors or administrators, where there are mutual debts between the testator or the intestate, and the other party, that one debt may be set off against the other, and such matter given in evidence on the general issue, or pleaded in bar: but if intended to be given in evidence on the general issue, notice must be given of the particular sum intended to be set off, and on what account it has become due." It was afterwards further enacted, by stat. 8 Geo. 2. c. 4. "That mutual debts might be set off against each other, *notwithstanding such debts were of different natures*, unless in cases where either of the debts accrued by reason of a penalty contained in any bond or specialty; in which case the debt intended to be set off must be pleaded in bar, and in which plea shall be shewn how much is truly due on either side; and in case the plaintiff shall recover, judgment shall be entered for no more than appears to be due after one debt set against another."

Under these statutes it has been decided,

Per Cur.  
Cowp. 57.

1. "That the debts which can only be set off against each other, are such as are *certain and liquidated*, and such as *assumpsit* would lie for to recover."

Howlet v.  
Strickland.  
Cowp. 56.

Therefore where to an action of covenant, the defendant pleaded a set-off of other *damages* done to him by the plaintiff and unliquidated, the plea on demurrer was held to be bad; for by Lord *Mansfield* the act of parliament and the reason of the thing refer only to *mutual debts*, and *damages* are not debts.

Nedriff v. Ho-  
gan.  
2 Burr. 1024.  
Freeman v.  
Nyett.  
1 Black. Rep.  
394. S. P.

So where in *assumpsit* for 40*l.* lent, the defendant pleaded articles of agreement with mutual covenants, in a penalty of 200*l.* for non-performance, and shewed a breach whereby the penalty had incurred, and offered a set-off. On demurrer the plea was over-ruled, and held not to be within the statute; for the penalty is not the whole sum, but found in *damages* which are uncertain.

"But

" But sums in the nature of *liquidated damages* for breach of any agreement, *and not in the nature of a penalty merely*, may be set off."

As where the defendant contracted with the plaintiff and another to do certain iron-work in a limited time, and a bond was entered into accordingly, whereby the plaintiff and the other persons stipulated to do the work within such time, or to pay a certain weekly sum of 10*l.* for every week it should remain unfinished. It was adjudged that these several weekly sums were in the nature of damages liquidated and agreed upon between the parties themselves, and so that the defendant might set them off against any demand the plaintiff might have against him.

Fletcher v. Dyke.  
2 Term Rep. 32.

2. " The debt to be set off must be a *good and subsisting* one when the action is brought" and therefore a *debt barred by the statute of limitations* cannot be set off; and if it be given in evidence on notice of set-off, the plaintiff may reply the statute of limitations; or the plaintiff may object to it at the trial, if attempted to be given in evidence, for the object of the statute being to prevent circuity of action, such debts only shall be allowed to be set off for which an action could be maintained.

Buller N. P. 180.

" It must therefore be an absolute debt due to the defendant."

For where in debt on a bond, the defendant pleaded a greater debt in bar, upon which the plaintiff prayed to have the condition of the bond enrolled; which was to appear at *Westminster*, and demurred; it was held, That this bond was not within the stat. 8 Geo. 2. for that statute relates to bonds for the payment of money, and not to bail-bonds: neither was it within the stat. 2 Geo. 2. because the plaintiff did not bring the action in his own right (he being an officer) but as trustee for another.

Hutchinson v. Sturges.  
Trin. 14 G. 2.  
C. B. Bull. N. P. 179.

But if the bond had been given to the sheriff and by him assigned to the party, it had been otherwise; for then the penalty would be considered as the debt, which the party might sue for as assignee of the sheriff, under statute 4 and 5 Ann. c. 16.

Lofting v. Stevens.  
Mich. 1753.  
Buller N. P. 180.

3. " The debts which can be set off must be such as are due in the same right."

Therefore in an action of debt against a man on his own bond, he cannot set off a debt due to him in right of his wife.

Paynton v. Walker.  
Pasch. 4 G. 2.

So where the defendants were insurance-brokers, and the bankrupt before his bankruptcy had underwritten for them several

C. B.  
Buller N. P. 179.

Wilson Ad. of  
Fletcher v.  
Watson and  
Creighton.  
Mic. 23 G. 3.

several policies on goods, the property of others, which had been losses, and for which the bankrupt was liable: to an action brought against the defendants for money due to the bankrupt, they pleaded a set-off of these losses: but it was held, That the losses being on goods the property of others, that the debts were properly to them, not to the brokers; and therefore could not be set off to a demand against the broker himself.

Grove v. Dubois  
1 Term Rep.  
112.

But where the broker had a commission *del credere*, and so was at all events answerable to his correspondents (the owners of the goods) it was held, That to an action brought against him by the assignees of the underwriter, that he might set off losses happening before the bankruptcy, as his own debt, or give them in evidence under the general issue.

Shipman v.  
Thomas.  
Pasc. 11 G. 2.  
C. B.  
Buller N. P.  
180.

So where the plaintiff's testator appointed the defendant his attorney to collect his rents, and after his death the defendant received rent which was in arrear in the testator's lifetime: the plaintiff, who was executrix, brought an action for the money in her own name; and the defendant gave notice to set off a debt due by the testator to him; but he was not allowed to give it in evidence on the trial, for the rent was due to the executrix, and never belonged to the testator; so that he never had any cause of action against the defendant, as the money was not received till after his death, and the money intended to be set off was a debt by the testator himself; and so the rights were different.

Brown v.  
Holyoak. 8 G. 2.  
Buller N. P. 179.

But where the testator has been indebted in his lifetime to the defendant, there the debt is clearly within the statute to be set off; and in such case the executor may admit such set-off without bringing an action.

#### 4. "*Money recovered by judgment may be set off.*"

Baskerville v.  
Brown.  
2 Burr. 1129.

In this case there were cross actions, *Baskerville* against *Brown* for 10*l.* and *Brown* against *Baskerville* for 30*l.* on notes, and both were to be tried at the same sittings. *Brown v. Baskerville* came on first, and *Brown* had a verdict for 30*l.* and he had given notice of a set-off of the notes: It was held, that on the second action *Brown* might give the former verdict in evidence, and bar *Baskerville's* demand by so much of it as amounted to the whole of it, and enter a *remittitur* on the first record for so much.

Thrustout ex.  
demif. of Barnes  
v. Crafter.  
2 Black. Rep.  
816.

So where the lessor of the plaintiff had a judgment for 40*l.* debt and costs, in a suit of the preceding term for the use and occupation of an house; and in the next term was nonsuited

non-suited in an ejectment against the same defendant, the costs of which were taxed to 12*l.* the court on motion ordered, that one demand should be set off against the other.

In the foregoing cases the two judgments to be set off were in the same court; but in this case where the defendant had a judgment in the King's Bench for 102*l.* against the plaintiff, and the plaintiff had a judgment in the Common Pleas for 106*l.* this last court allowed on motion, one to be set off against the other.

Barker v. Braham.  
2 Black. Rep. 869.  
3 Will. 396.  
S. C.

But in cases of this nature, the attorney having a lien for his bill of costs on the money recovered by the judgment, the court will not permit one judgment to be set against the other to the full extent of it, without securing to the attorney the amount of his bill.

Mitchell v. Oldfield.  
4 Term Rep. 123.

5. If debt is brought on a bond conditioned for the payment of an annuity, the defendant may have a set off against the arrears of the annuity due at the time of the action brought; and the bond is not thereby discharged, but remains as a security for the growing arrears.

Collins v. Collins.  
2 Burr. 820.

6. "If the defendant gives notice of set-off, it must be certain as to every matter whereby it accrues."

Therefore where the notice of set-off, was in these words, "Take notice that you are indebted to me for the use and occupation of an house for a long time held and enjoyed, and now lately elapsed:" The debt intended to have been set off was *rent reserved on an indenture*, which not being mentioned in the notice, the court would not admit it in evidence; for if it had been shewn, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand. These notices should be almost as certain as declarations.

Fowler v. Jones.  
Sittings at Westminster.  
Hill. 8 G. 2.  
Buller N. P. 179.

From hence it appears, that where the plea of set-off is of an equal sum to that declared for, the action is barred: but where it is of a lesser sum than that for which the action is brought, the defendant must pray to have it set off.

Cook v. Dixon.  
B. R. 1735.  
Bull. N. P. 179.

And Note, That as stat. 2 Geo. 2. requires notice where the defendant means to give a set-off in evidence, where in this case the defendant had pleaded the general issue, but forgot to give notice, he was allowed to withdraw his plea and give the notice.

Blakburn v. Matthias.  
2 Stra. 1267.

7. The statutes of set-off are extended to Bankrupts by stat. 5 Geo. 2. c. 30. s. 20, which enacts, "That where it shall appear to the commissioners that there has been a  
R "mutual

Cowp. 135.

“ mutual credit given by the bankrupt and any other person,  
 “ or mutual debts between the bankrupt and any other per-  
 “ son before the bankruptcy, the commissioners or assignees  
 “ shall state the account between them, and one debt may be  
 “ set against another ; and what shall appear to be due on the  
 “ balance, and no more, shall be claimed or paid on either  
 “ side.”

Ridout v.  
 Brough.  
 Cowp. 133.

Though under this act of parliament the commissioners have a power of making and allowing a set-off, yet it does not prevent the right of pleading or giving notice of a set-off to an *action at law*: for if the assignees bring an action for a debt due to the bankrupt estate, the defendant may plead a set-off of a debt due to him by the bankrupt.

“ But the debts only which can be set off in this case, are  
 “ such as were mutual debts from and to the bankrupt at the  
 “ time of the bankruptcy, and for which there were at that  
 “ time mutual remedies.”

March, assignee  
 of Hay v.  
 Chambers.  
 2 Stra. 1234.

For where to an action by the assignees of a bankrupt, the defendant gave notice of set-off, and at the trial produced a note given by the bankrupt prior to his bankruptcy to one *Scott*, and indorsed by *Scott* to the defendant; but it appearing in evidence that the indorsement had been made *subsequent to an act of bankruptcy*, it was held, that this could not be set off; for there never was any debt due by the bankrupt to the defendant, and he could not be in a better situation than the indorser of the note, who could only have come in as a creditor under the commission.

In the case of *Ryal v. Larkin*, 1 *Will.* 155, and *Buller*, N. P. 181, it is laid down as law, that the statutes of set-off do not extend to the assignees of a bankrupt, and it is on the ground that, if the assignees brought an action for money due to the bankrupt, that as the defendant could not have an action against them, but must prove the debt under the commission or proceed at law against the bankrupt himself, that therefore the defendant should not be allowed to set it off. This doctrine is over-ruled as a general one in *Cowp.* 133. But the case itself seems to be reconcileable to the principle now laid down, viz. That the debts to be set off must be mutual at the time of the bankruptcy.

Vid. same cas.  
 Bull. N. P. 181.

The case was that to an action for goods sold by the assignees to the defendant, he pleaded a set-off of a debt due by bond to him by the bankrupt before his bankruptcy, which was disallowed; and the reasons seem to be, first, That as the debt was for goods sold by the assignees, that there was no debt due to the bankrupt, it was to the assignees, and so there

was

were no mutual debts at the time of the bankruptcy. And, secondly, That if this was allowed, a creditor might buy up the bankrupt's effects from the assignees under their sale; and if allowed to hold the price as a set-off to his own debt, he might get twenty shillings in the pound, which would be a fraud on the bankrupt laws.

8. "In general, a set-off is only pleadable, or to be taken advantage of, where the action is for money, either *expressly ascertained*, as debt, or in the form of *certain damages*, as covenant for rent arrear."

For where in *replevin* the avowant justified under a distress for rent, the plaintiff insisted at the trial that there was more due to him than the rent amounted to, which he endeavoured to take advantage of. Justice *Denison* refused the evidence, and on a motion for a new trial, the court held, that the statute 2 *Geo.* 2. did not extend to the case of a distress which was not properly an action, but a remedy without suit; they likewise declared that it did not extend to detain, and the like actions of wrong.

*Absolem v. Knight.*  
*Palch.* 16 G.  
2. C. B. Bull.  
N. P. 181.

But where the action was covenant for non-payment of rent, the defendant pleaded *non est factum*, and gave notice of set-off; the judge was of opinion, that it could not be given in evidence on this issue. But on a motion for a new trial the court held, that the evidence ought to have been admitted: for the general issue mentioned in the statute must be understood to be any general issue: and a new trial was ordered.

*Gower v. Hunt.*  
Bull. N. P. 181.

## 2. Of the Plea of a Release.

1. If a man be bound by his deed to another to pay him a certain sum at *Michaelmas* following, and before that time the obligee releases to the obligor all actions, he shall be barred of the duty for ever, and yet he could not have an action at the time of the release made. But if a man lets land to another for a year, yielding the rent at *Michaelmas*, and before *Michaelmas* the lessor releases to the lessee all actions, yet after the feast the lessor may have his action for the rent, for the release does not discharge it; and the reason is, that the first is a debt at the time, for which the obligor has then a right of action, though it is *solvendum in futuro*: but the rent is no debt till the day on which it is payable, for it is payable out of the profits of the land, and if the lessee is evicted before the day, no rent is due; but the lessor may discharge the lessee of the rent before the day, by a special release.

*Litt. sect.* 512,  
513.

*Co. Litt.* 292. b.

Stephens & ux.  
v. Snow.  
2 Salk. 578.

So a *release of all demands* will not operate to release *rent before it becomes due*, for then there is no demand: But it will release *rent then due*.

Bower v.  
Swadlin.  
1 Atk. 294.

2. In the case of *bonds*, if there are two obligors, a release to one is a release to both; as well at law as in equity; for it releases the contract, and so operates in favour of both.

Aloff v.  
Scrimshaw.  
2 Salk. 573.  
1 Show. 46.  
S. C.

But if a man be bound to another in a bond, and the obligee makes a covenant, binding himself not to sue the obligor for 99 years, this shall not operate as a release or defeasance, but merely as a covenant *not to sue*; and therefore is not pleadable in bar to debt on a bond.

Hodges v. Smith  
Cro. Eliz. 613.

But a deed of defeasance by which the plaintiff covenanted in consideration of 100*l.* to be paid at a future day, to discharge the defendant of the bond in question, was held to be a good bar.

2. "Though a release of all demands will discharge a bond, a distinction is to be observed when it is of demands against the person and against the estate."

Topham v.  
Tollier.  
Salk. 575.

For where to debt on a bond against an administrator, he pleaded, That the plaintiff had released all right, title, interest, and demand against the personal estate of the intestate. On demurrer this was held to be no plea: For, *per Holt*, there is a difference between a release of all demands to the person of the administrator and to the estate. Here the release is to the estate and void, for the bond is not any demand against the personal estate till judgment and execution sued out.

Dyer 28.  
12 Hen. 8. 1.

A release cannot be given in evidence without pleading; for it being a discharge by deed, all legal solemnities must be shewn to the court.

Hoe's case.  
5 Co. 70. b.

3. *In case of records*, if a man is bail for another, and *before judgment* the plaintiff in the action releases to bail all actions, duties, and demands, it is no bar; for there was no duty against him till judgment against the principal.

### 3. Of the Plea of Discharge under an Act of Insolvency, or Certificate as a Bankrupt.

The acts of insolvency are occasional ones, but usually enact, "That any person whose debts do not amount to 100*l.* may, on giving notice fourteen days before to his creditors, and delivering up upon oath all his effects (his bedding, apparel, and implements of his trade only excepted



"cepted) be discharged on petition to the court from whence the process issued, or to the sessions."

1. "This act is always construed favourably for the prisoners;" and therefore where the prisoner had not given fourteen complete days notice, unless the days of the notice and bringing up were construed to be inclusive, the court held that they might be so. Morley v. Vaughan. 4 Burr. 2525.

2. "The act discharges the insolvent debtor of debts not due at the time of the taking place of the statute."

As where he was indorser of a promissory note *which had three months to run at that time*, he was held to be discharged; for it was *debitum in presenti solvendum in futuro*. Workman v. Leake. Cowp. 22.

So where the act commenced *the 28th of January, 1778*, and the bond in which the person was bound was dated *September 21, of the preceding year 1777, and was due in September 1778*, it was held to be discharged under the statute, on the same ground. Paget v. Wheate. Quot. Cowp. 23.

But where there is a bond with a penalty, and also a deed of covenant, and the defendant takes the benefit of the act of insolvency, whereby the bond is discharged, he is still liable on any future breach of his covenant, unless specially saved by the statute. Cottrell v. Hooke. Dougl. 93.

3. "If the defendant pleads a discharge under the act, he should bring himself clearly within it." For when he pleaded that he was *imprisoned* on the day mentioned in the act, but did not say *for what*, it was held to be ill; for he might have been so imprisoned for a *fine* to the king for contempt, which would not be discharged by the act. Haughton v. Shellcross. 3 Lev. 190.

4. In an action by the assignees of an insolvent debtor, the certificate made at the sessions is *prima facie* evidence of a due discharge, and of all the proceedings under the insolvent act; and if there has been any fraud or irregularity in the proceeding, it lies on the defendant to shew it: *as want of notice, collusion, &c.* Laborde v. Pegus. Mich. 1772, at West. Gyllom & ux. v. Stirrup. Trin. 2 Geo. 2. B. R. Bull. N.P. 173. Savage v. Field. Mic. 9 G. 2. Bull. N.P. 173.

And where in debt upon bond the defendant pleaded the insolvent debtor's act, the plaintiff replied, That there was *no notice given to him pursuant to the act*; and issue being joined thereon, the summoner being dead, the duplicate of the proceedings before the justices was held to be evidence, because the notice was not a matter on which to found their jurisdiction: if it had been so, that evidence would not have been sufficient; but in this case they are judges of the sufficiency of proof of notice, it being part of their jurisdiction, and consequently their duplicate of its being a good

good notice, will be good evidence, the summoner being dead.

5. How far the certificate of a bankrupt discharges debts. *Vid. Ch. Assumpsit, pag. 157, ante.*

Birch v. Sharland.  
1 Term Rep.  
735.

In this case, the defendant being in execution at the suit of the plaintiff in September, 1785, a commission of bankruptcy issued against him; soon after, in order to regain his liberty, he gave the plaintiff a bond and warrant of attorney to confess a judgment for the old debt: the defendant having obtained his certificate, it was contended for him, that the bond having been given for the old debt, it was discharged by the certificate; but the court held, That this bond was given for a new consideration (the obtaining the defendant's liberty) and so was not discharged by the certificate.

I. Having now considered the several pleas in this action with reference to the contract, *the Pleas with Reference to the Person* now remain.

I shall premise a few cases *on the nature of joint and several bonds or securities.*

Gilbert v. Bath.  
1 Stra. 503.

I. If two are bound *jointly* in a bond, and one only is sued, the other must take advantage of it by *pleading in abatement*; for if he demands oyer and demurs, the plaintiff shall have judgment; for the court will presume that the other never sealed it.

Co. Litt. 283. a.

And in such case where one only is sued, he cannot plead *non est factum*; for it is his deed, though not his sole deed.

Hollingsworth v. Afcuc.  
Cro. Eliz. 55.

And therefore where the defendant does so plead this matter in abatement, "that another was bound with him," he must plead further, "That the other *did seal and deliver* it as his deed," or the plea will be bad; for by such means only is the deed good, and without such averment the court will presume that the other never did seal it.

Matthewson's case.  
5 Co. 22. b.

If several are bound together in a bond or deed (as *ex. gr.* merchants in a charter-party) but *they covenant separately*, if the seal of one of the merchants is broken off, it shall not avoid the deed as to the others, for the several covenants are as several deeds; but had they been bound jointly it had been otherwise: but where they do covenant *severally*, if a *rafure* is made, it shall avoid the deed as to all; for that affects *the deed itself*, without any difference as to the parties.

2. If a bond be made to several, they must all join in an action, for their interest is joint, and they cannot have several actions: the bond in this case was to the plaintiff and another, & *omnibus & cuilibet eorum*, that is joint and several; when on demurrer it was held, That the interest was joint, and that the words & *cuilibet eorum* should not enable each to bring a separate action.

Spencer v. Durant.  
1 Show. 8.

But if the bond is so, and one only brings the action, the defendant must take advantage of it by pleading *in abatement*; for if he pleads it in bar it is bad, and the plaintiff shall have judgment.

Islam & Paget v. Hitchcock.  
Cro. Eliz. 402.

## 2. OF PLEAS WITH REFERENCE TO THE PERSON.

### 1. OF THE PLEAS IN THIS ACTION BY THE HEIR.

"As the heir is chargeable only where he has assets by descent; if he has none, the proper plea is *riens per descensum*; and this shall refer to the time of the ancestor's death:

"For it is enacted by statute 3 & 4 W. & M. c. 14. That if the heir alien before action brought, yet he shall be liable to the value of the land, and if he pleads *riens per descensum*, the plaintiff may reply, That he had lands from his ancestor before the original brought or bill filed; and if upon issue joined thereon, it is found for the plaintiff, the jury shall enquire of the value of the land descended, and thereupon judgment be given, and execution awarded as aforesaid (*i. e.* to the value); but if judgment be given by confession of the action, without confessing assets descended, or upon demurrer, or *nihil dicit*, it shall be for debt and damages, without any writ to inquire of the value of the land descended."

1. "The replication under this statute should be merely on the descent of the lands, not of their sufficiency to answer the debt; for of that the jury are to enquire under the former issue."

For where the defendant pleaded *riens per descensum*, *al temps del original*, and the plaintiff replied, that the defendant had sufficient lands before the time of the original purchased; and on issue thereon, the plaintiff had a verdict, but *there was no inquiry of the value of the land*; the court awarded a repleader, for the issue should not have been joined on the sufficiency of the land descended.

Jefferies v. Barrow.  
Pasch. 12 Ann.  
Buller N. P.  
176.

2. "The heir cannot have two defences, the one by common law, the other by statute."

For

Winder v.  
Barnea.  
Pasc. 15 Geo. 2.  
Buller N. P.  
176.

For if to *riens per descent al temps del writ*, the plaintiff replies, That before the time the lands descended, the heir cannot rejoin that he sold them, and paid bond-debts to the amount: he ought to disclose the whole in his bar at once.

Sherwood v.  
Adderley.  
1 Lord Raym.  
734.

But in debt on a bond against the heir, on the issue of *riens per descent*, he may give in evidence an *extent* against himon a bond owing by his father to the King: but it will be necessary to produce the bond, or a sworn copy of it.

Buckley v.  
Nightingale.  
1 Stra. 605.

3. Where the heir has lands by descent, if he pays the debt of his ancestor to the amount of the value of the lands, he shall hold them discharged: and this special matter being pleaded shall be a good discharge, for he is not chargeable farther than the value of the lands descended.

4. By stat. 3 & 4 W. & M. c. 14. "If the ancestor devises away his lands to a stranger, and dies indebted by bond or other specialty, the lands shall be liable in the hands of the devisee; and the action shall be brought against him and the heir jointly."

Allan v. Heber.  
2 Stra. 1270.  
2 Black. Rep.  
22. S. C.

And *Note*, That if the ancestor devises his estate to his heir, and the tenure and quality is the same, and the limitations unvaried, though charged with his debts, the heir shall be in by descent.

Gooch's case.  
5 Co. 60. a.

So if the ancestor makes a voluntary settlement, under which the heir claims, but which is void against creditors by stat. 13 Eliz. c. 3; in such case the heir shall be in by descent.

## 2. OF THE PLEAS BY EXECUTORS OR ADMINISTRATORS.

These are, 1st, Retainer: 2dly, Plene Administravit: 3dly, Ne unques Executor.

### And first, Of the Plea of Retainer.

1. "By law an executor or administrator is entitled to retain for his own demand against all others of equal degree."

"And this whether the debt is due to him in his own right, or as trustee for another."

Plumer v. Merchant.  
3 Burr. 1380.

For where the defendant was co-trustee in his intestate's marriage settlement, under which the intestate covenanted with the defendant and another trustee, that he would by his

his last will and testament, leave, or that his executors or administrators should, within six months after his decease, well and truly pay to the defendant and the other trustee 700*l.* or to their executors, &c. the interest to be applied to the maintenance of his wife; for which he bound himself, his heirs, executors, and administrators, in a penalty to the defendant and the other trustee. He died intestate, the defendant administered to him, and being sued by the plaintiff in debt on a bond for 200*l.* it was adjudged, that as the plaintiff's demand and his own were both in the same degree, and as he might as such have paid to the other trustee to the amount of the bond, that therefore he might retain as administrator, although no demand had been made against him either by the wife or her other trustee.

And it was, secondly, further held as settled, That the defendant might either plead a retainer, or give it in evidence on *plene administravit* pleaded. S. C.  
Bond v. Green.  
Brownl. 75.

So where the defendant's husband covenanted with her father as trustee for her, on her marriage, to leave her his personal estate and 200*l.* *per ann.* the marriage was had, and the testator (the husband) died without issue, having made his will, whereby he subjected his real and personal assets to the payment of his debts, and gave the remainder to his wife, whom he made executrix; but his real and personal assets together were not equal to the value of the 200*l.* *per ann.* annuity from the time of the testator's death. She administered to her husband: it was resolved, that she had a right to retain so much of the husband's effects as would answer the covenant. And, 2dly, That she might give this retainer in evidence on the general issue. And Chief Justice *De Grey* there quoted a case as decided, that where a widow executrix had paid off a mortgage on her jointure, which the husband had covenanted to be free from incumbrances, that she might retain to the amount of the sum paid off, out of his other effects. Loane v. Casey  
Exr.  
2 Black Rep.  
965.

2. "But this privilege of retainer is only allowed to a rightful executor or administrator."

For an executor *de son tort* cannot retain: for so would he have advantage of his own wrong. Coulter's case.  
5 Co. 30.  
3 Term Rep. 58.

Therefore if the defendant pleads a retainer, he ought to shew that testator had made him executor; and it is not enough to say, that testator made his will, and that he, *suscepto super se onere testamenti*, paid divers debts, and retained for a debt of his own. If he pleads so, the plaintiff may either demur Atkinson v.  
Rawson.  
Mich. 27 G. 2.

demur specially for that cause, or reply that he was executor *de son tort*.

Vaughan v.  
Brown.  
2 Stra. 1106.

Though when the plaintiff so replies, that he was executor *de son tort*, the defendant may plead *puis darrein continuance*, that *he had since obtained letters of administration*; for such administration will legitimate all intermediate acts, and justify a retainer.

Simpson v.  
Tredler, in Kent,  
1661, per  
Weston.  
Buller N. P.  
141.

But where administration has been granted to a creditor, and afterwards repealed at the suit of the next of kin, the creditor may retain against the rightful administrator; for where administration is granted to a *wrong person*, it is only *voidable*; but if granted in a *wrong diocese*, it is *void*.

3. "If a person obtains goods of a person deceased, and thereby becomes executor *de son tort*, he must deliver over the goods to the rightful administrator *before action brought*, or he shall be chargeable."

Curtis v. Ver-  
non.  
3 Term Rep.  
587.

Therefore where in case on promises by the testator, the defendant pleaded that he was never executor but of his own wrong, and that he had delivered over all the goods of the testator which came to his hands, to the plaintiff the executor, but did not say *before action brought*; on demurrer the plea was adjudged to be bad, for a delivery of the goods by the executor *de son tort*, after action brought against him, was no discharge to him.

4. And as to what shall constitute a man executor *de son tort*, these points are settled:

Read's case.  
5 Co. 33.

Anon.  
Salk. 313.

1. If a man dies intestate, and a stranger takes his goods, and uses them, or sells them, this shall make him executor *de son tort*. 2. But when an executor is made, and he proves the will and administers, if a stranger takes the goods of the testator, and claiming them as his own, uses them, or disposes of them, this shall not make him an executor *de son tort*; but if such stranger, where there is a rightful executor, takes the goods, and claiming to be executor, *pays money or legacies, or receives debts*; there he shall be charged as executor *de son tort*. Or, 3. If an executor is appointed and a stranger takes the goods, and meddles with them *before the executor proves the will*, he shall be charged as executor *de son tort*.

Padget v. Porter  
& alt.  
2 Term Rep.  
97.

2. What shall constitute an executor *de son tort* is matter of law, after the jury have found what acts were done by the person charged as such: and if a person employs another to sell the effects of the intestate, and receives the money, which money he has in his hands when the action is brought against him for a debt due by the intestate, he

he is chargeable as executor *de son tort*. As in this case, where one *Shore*, a publican, a few days before his death, sent to *Porter* (the defendant) who was his brewer, desiring him to send some one to take care of his cellar, &c. *Porter* sent *Payne* his servant, who sold beer before the intestate's death and after it; he also by the intestate's direction sold some hogs, the produce of which and of the beer sold, he paid over to *Porter*; it was adjudged, That this was sufficient to charge *Porter* as executor *de son tort*: and in the present case both parties having paid money into court, that was held to be decisive to fix them.

## 2. Of the Plea of Plene Administravit.

Under this issue it is material to consider, 1st, The order in which debts are to be paid by Executors: 2dly, The manner of pleading the payment of such Debts.

### 1st. Of the Order in which Debts are to be paid.

1. An executor is bound to pay according to the rank of <sup>2 Black. Comm.</sup> the debts; that is, after funeral expences, first, debts of record, or by specialty due to the king. 2. Debts by particular statutes having precedence to others; as forfeitures for not burying in woollen; for poor's rates; for letters due to the Post-office, and some others. 3. Debts of record; as judgments docketed according to the statute 4 & 5 W. & M. c. 20. statutes and recognizances. 4. Debts due by specialty, as rent upon bonds or covenants. And, 5. Simple contract debts, as on notes unsealed and verbal promises.

But though rent is reserved by parol, and the lease determined, yet it shall rank as a debt by specialty, and a bond outstanding cannot be pleaded in bar to it, for the contract still remains in the realty.

Godfrey v. Newton.  
Case K. B. 7.  
Willett v. Earle.

2. If the executor or administrator pays debts of an inferior before those of a superior degree, he must answer those last out of his own estate. But in order to charge him on that ground, it must appear that he had notice of such debts of higher degree being then subsisting. And that is only from the creditor of such debt bringing an action against him for it, for that only is legal notice.

1 Vern. 490.  
2 Black. Comm. 511.

And a bill filed, or a decree in the Court of Chancery, shall be deemed of equal validity to attach a priority of demand, or operate as a notice as an action at law.

Morrice v. Bank of England.  
1 P. Wms. 401.  
In not.

3. "And notice is so necessary to charge the executor or administrator," That if an action is brought by a creditor on simple contract, and a judgment recovered, the executor

Davis v. Monkhouse.  
Fitzgib. 76.  
1 Mod. 175.  
S. P.

cutor may plead that judgment in bar to debt on a *bond*; for otherwise an executor or administrator might be ruined, by the obligee keeping the bond without giving notice of it.

Sawyer v.  
Mercer.  
1 Term. Rep.  
696.

But where to debt on a bond against an executor or administrator, he pleads a judgment confessed to an action on a simple contract debt, he must further plead, "*That it was without notice of the plaintiff's demand*;" for in such case only is he excused, and otherwise he might defeat all the specialty creditors.

Anon.  
Cro. Eliz. 41.

4. "In debts of the same degree, *priority of action* creates a priority of right to payment;" that is, an executor or administrator shall not confess a judgment to a later brought action in prejudice to a former; for he who first sues shall be first paid.

"For the right attaches by *bringing the action*, and not by the judgment."

Waters & Ogden.  
Doug. 436.

Therefore where to debt on a bond against an administrator he pleaded *plene administravit* except assets confessed to another action on a bond of the testator's of the same term, and then depending, and *nil assets ultra*. The plaintiff demurred for cause, that *there was no judgment shewn*, and that it was not priority of *action* but of *judgment* that attached the assets in the hands of the executor, and that therefore an action depending and confession of assets without judgment was a bad plea; but the plea was held to be good, for that *bringing the first action* created the preference, and an executor or administrator should not be twice charged, which he would be if this plea was disallowed; for having assets to a certain amount, he was obliged to admit these in his plea to the first brought action.

Smith v. Harman.  
Salk. 315.

So if a man has an interlocutory judgment against an executor and dies, and his administrator sues out a *scire facias* on it, the executor cannot plead a judgment obtained against him in bar; for the judgment is absolute, and the defendant can only move to *arrest* it.

"And therefore the plea should shew that no payment was made after the action commenced by the plaintiff."

Hewlet v.  
Framingham.  
3 Lev. 28.

For if the defendant in such case pleads so, and *sic plene administravit*, or this last only, the plea should conclude, "That he has no goods or chattels of the testator, *nor bad at the day of suing out the writ*, nor ever since:" for without such addition, as the plea refers to the time of its being pleaded, he might have paid debts between the time of



of the writ being sued out and the plea pleaded, which by law he should not have done.

5. As to the Order of the Debts in particular.

In strictness, no *funeral expences* are allowable against a Shelley's case. creditor, except the coffin, ringing the bell, parson, clerk, Salk. 296. and bearer's fees, but not for pall or ornaments. The usual sum allowed is five pounds.

If the testator acknowledges a *statute or recognizance*, with condition to pay a lesser sum at a future day; it will be a bar to debts of inferior degree, *though the day of payment be not yet come*, because it is a present duty, and is on record, on which execution may be taken out without further suit. Ball N. P. 141.

So though a *bond has some time to run* before it is due, yet it is a good bar to debt of inferior degree. Lemure v. Fooke. 3 Lev. 16.

And by the custom of *London*, simple contract debts due from one citizen to another, in case of intestacy, shall be paid in equal degree with those due by specialty. Buckland v. Brooke. Cro. Eliz. 315. Snelling's case. 4 Co. 82. b. Cro. Eliz. 409. S. C.

2. In what manner Payments under Administration are to be pleaded.

1. An executor or administrator should plead truly and honestly, and though there is a judgment for a *penalty*, he ought to plead the judgment, and shew *how much is really due*. Parker v. Atfield. Salk. 311.

2. If he pleads several judgments, and any one be ill pleaded or found fraudulent, the plaintiff shall have judgment. As if on such judgments pleaded, the plaintiff was to reply *per fraudem*, and prove *that the debtor was willing to take less than was recovered*, this would be sufficient to prove the judgment fraudulent, unless the executor or administrator could shew that he had not assets even to pay that sum. Ibid.

3. If an executor or administrator pleads six judgments, *et nil assets ultra*, it is a confession of assets to above five, *Ibid.* Aston v. Sherman. Salk. 298. and the *nil ultra* is not material or traversable, being but form.

And in such case the defendant may plead the judgments generally, *without shewing the consideration of them*; for if fraudulent, that should come out from the other side. Williams v. Fowler. 1 Str. 407.

Philips v.  
Echard.  
Cro. Jac. 35.

So the defendant may plead a statute entered into by his testator and then unpaid, without saying that it was for a *just debt*.

Newton v.  
Richards.  
1 Salk. 296.

But if an executor pleads *plene administravit* to a *scire facias* on a judgment against the testator, it is bad; for the plea should shew "*how he had administered*." For against a judgment he should shew how administered; but this should be shewn for cause of special demurrer.

Littleton v.  
Hubbins.  
Cro. Eliz. 793.

And *Note*, That it has been held that an executor is bound to take notice of a judgment obtained against his testator.

Ramden v.  
Jackson.  
1 Atk. 292.

4. If an executor pleads *non est factum* to debt on a bond, it is an admission of assets.

Barry v. Ruff.  
1 Term Rep.  
691.

So where an administrator on an action brought against him, submitted to an arbitration, and bound himself as administrator to abide by the award, and to pay what should be awarded, it was resolved, That to debt on the arbitration-bond, he could not plead *plene administravit*, for submitting to the arbitration was an admission of assets.

Rock v. Leigh-  
ton.  
Salk. 310.

5. If an executor confesses or suffers judgment to go by default, he admits assets in his hands, and is estopped to say the contrary. And if another action is pending against him at the same time, during which the former judgment was obtained, and he neglects to plead that judgment, and *nil assets ultra*, it is a confession of assets in the second action also.

And this is such an estoppel as to the jury, on a writ of inquiry, that if there are not goods of testator's to answer the second judgment, the sheriff should return a *devastavit*.

1 Roll. Ab. 937.  
Buller N. P.  
144.

In general, executors are no further chargeable than they have assets, unless they make themselves so by their own act, as *pleading a false plea*; i. e. such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false, as *ne unques executor*, or a release: but if an executor pleads a former judgment had against him by another person, and *nil assets ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet shall the judgment only be *de bonis testatoris*.

Harrison v.  
Beecles.  
Guildh. Trin.  
1769, Cited  
per Lord Ken-  
yon.  
3 Term Rep.  
688.

However, this is so generally laid down, yet in this case, where in *assumpsit* against an executor, he pleaded *non-assumpsit* and *plene administravit*, it was insisted that if the plaintiff could prove assets unadministered to any amount, that he must have judgment for the whole. Lord Mansfield said,

bid, the law had been understood to be so, and many cases decided to that effect; but that he thought it absurd and wrong that the plaintiff should recover of the executor *more than the assets in his hands*: and the judgment was given accordingly.

So if an executor has a good defence, and neglects to avail himself of it by pleading it, and has therefore judgment against him, this shall amount to an admission of assets, and shall be conclusive evidence against him in a debt on a judgment suggesting a *devastavit*.”

But a *cognovit actionem* is no admission of assets.

*Bird v. Culmer.*  
Hob. 178.

### 3. Of the Plea of *Ne unques Executor*.

“Under this plea it comes in question, not merely whether the person is actually executor, but whether administration has been properly committed to him or not?”

1. Where there are *bona notabilia* in several dioceses of the same province, there must be a prerogative administration. If there are *bona notabilia* in different dioceses of the different provinces of *York* and *Canterbury*, there must be a prerogative administration in both; but if in one diocese of each province, each bishop may grant administration.

*Burton v. Ridley.*  
Salk. 39.

And *bonds or specialties* are *bona notabilia* where the securities are at the time of the death. But debts by simple contract follow the person of the debtor, and are goods in that diocese where the debtor is at the time of the creditor's death.

*Byron v. Byron.*  
Cro. Eliz. 472.

2. If a diocesan bishop grants a probate of a will where there are *bona notabilia* in other dioceses, it is void. But if the deceased had *bona notabilia* only in one diocese, and a prerogative probate is taken out, it is not void, but voidable only. And in such case the diocesan cannot grant a probate till the prerogative administration is repealed.

*Rex v. Loggen*  
& alt.  
1 Stra. 74.

And where it appears that there are *bona notabilia* in any one diocese, the court will not suppose that there are *bona notabilia* in any other diocese, but will rather intend for the sake of supporting the letters of administration, that the intestate did not leave *bona notabilia* in any other diocese.

*Griffith v. Griffith.*  
Sayer Rep. 83.

3. If administration is granted to one *durante minore etate* of an administrator, it shall subsist till the administrator attains the age of *twenty-one years*; for an administrator is as a trustee, and no one is capable of acting as a trustee for another till he attains his full age. But if administration is granted to one *durante minore etate* of an executor, it shall cease when the executor attains the age of *twenty-one*

*Freke v. Thomas.*  
Salk. 39.

Pigot's case.  
5 Co. 29. a.

*teen years*, for the executor is appointed by the party himself, and may by the spiritual law be executor at the age of seventeen.

Prince's case.  
5 Co. 29. b.

But in such case of administration *durante minore etate* of an executrix, if she is under seventeen years of age and she marries a man of full age, the first administration shall cease, for the husband may administer as executor.

All these cases therefore of administration granted irregularly, the defendant may take advantage of.

As to the plea itself, it is to be observed,

Arnold v.  
Arnold.  
Hill. 6 Geo. 2.  
Per Eyre.  
Buller N. P.  
143.

1st. That if an executor pleads *plene administravit*, and thereupon issue is joined, that he has admitted himself to be executor, and therefore cannot shew that he only acted as agent for the executor; for then he should have pleaded *ne unques executor*. But if he gives in evidence a retainer, the plaintiff cannot object that he was executor *de son tort*, and so could not retain, without shewing the will, and who were rightful executors.

Jane Noel v.  
Wills.  
1 Lev. 136.  
1 Sid. 359. S. C.

2. Upon the plea of *ne unques executor*, may be given in evidence that the seal of the ordinary was forged, or administration repealed, or that there were *bona notabilia*; but evidence that another person is executor, or that testator was *non compos*, or that the will was forged, cannot be given in evidence: for that would be to falsify the seal and proceedings of the ordinary in a matter of which he has cognizance, and wherein he is judge: but in the former cases the seal of the ordinary is admitted and avoided.

Harding v. Sal-  
kill.  
Salk. 296.

3. If an action is brought against a person as executor, and he pleads that he is not executor, but administrator, it must be pleaded in abatement, and not in bar; for a recovery against one as executor is a good bar to another action for the same cause against him as administrator.

Fooler v. Cooke.  
Salk. 297.  
Powers v. Coote.  
Salk. 298.

And where the defendant does so plead that he is administrator, in abatement, he need not traverse that he ever intermeddled as executor, which he might have done, and so have been executor *de son tort*: for it shall not be intended that he did so, as all acts are intended to be rightful till the contrary appears. For if in fact the defendant was executor *de son tort*, the plaintiff might reply it; and besides, the defendant need only traverse that which the plaintiff has alleged in his declaration.

S. C.

But if the defendant is sued as administrator of *J. S.* and pleads that he is executor, then the defendant must go on and traverse, "*Abfq. hoc that J. S. died intestate*; and the reason is, that unless there was a dying intestate, no ac-  
tion

tion can be brought against one as administrator; and to say that he was executor, is by implication only an answer to the dying intestate.

### III. OF THE EVIDENCE.

#### I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

"If there is in the declaration any averment which does not go to the gift of the action, nor is necessary to the support of it (as on a collateral matter) such averment need not be proved."

As where in debt on a policy of insurance, the plaintiff, in his declaration, stated an agreement in the policy, That if any dispute arose, it should be referred to arbitrators chosen by either party, and averred *that it had not been referred*, but without any default in him. At the trial, the plaintiff did not prove *that he had ever named a referee*; and it was therefore objected, That he had not proved his declaration. But on a case reserved, the court were of opinion, that it was a collateral matter, and no part of the contract; and so being not necessary to have been set out, need not be proved. Hill v. Hollister.  
Falc. 19 G. 2.  
K. B.  
Buller N. P.  
187.

#### 1. In the case of Bonds.

1. "As the validity of a deed depends on the *delivery* as well as the execution of it, both are necessary to be proved." Buller N. P.  
254.

As where in debt on a bond, the defendant pleaded *non est factum*, and the jury found specially, that the defendant had signed and sealed the bond, and cast it on a table, and that the plaintiff took it without any other delivery, or any thing amounting to a delivery, the court held clearly that this could not be deemed a sufficient delivery in law; and the defendant had judgment. Chamberlain v.  
Staunton.  
1 Leon. 149.

But where on a like issue the proof was, that the obligor after it had been written and sealed by his direction, delivered it to the obligee, saying "This will serve:" this proof was held to be sufficient of the delivery. Parkerv. Gibson  
Dyer 192.

It is therefore a general rule; "That the subscribing witness to a bond should, in an action on it, be always produced to prove the execution of it," unless some reason is shewn why he cannot be procured; neither will the confession of the obligor himself to a third person be sufficient: but if the Abbot v. Plumb.  
Doug. 205.

S

subscribing

subscribing witness denies the deed, other witnesses may be called to prove the execution.

**Ley v. Ballard.**  
Gulldh. Hill.  
1790, MSS.

Therefore where in debt on a joint and several bond, and brought against one obligor only, the two subscribing witnesses could prove the execution of the bond only by the other, it was ruled by Lord *Kenyon*, That where there could be no direct proof of the execution of the bond by the subscribing witnesses, that collateral evidence was admissible; he therefore admitted a witness to prove, That defendant had said that he had signed and sealed the bond, and was afraid that he should be obliged to pay it: and the plaintiff had a verdict.

**Hall v. Dunster-**  
**ville.**  
4 Term Rep.  
313.

So where two persons were partners in a transaction, and one of them only (but *in the presence of the other*, and *by his authority*) executed the deed in the name of both, it was adjudged to be a good execution to charge both, though he put the seal on but once, and so delivered it.

“ So where the subscribing witness *cannot be bad*, or “ is incapacitated, collateral evidence is good and ad- “ missible.”

**Coghlan v.**  
**Williamson.**  
Doug. 89.

As where the subscribing witness was of the name of *Steele*, who not being produced, the plaintiff proved, that a person of that name had gone out to *India*, in a ship of which the defendant was purser, but that inquiries had been made after him, and he could not be found. The plaintiff proved further, that he had applied to the defendant to settle the bond, and that he then offered 80*l.* and to settle the rest with interest at the end of the year. Under these circumstances it was held to be sufficient evidence to support the plaintiff's action, *to prove the defendant's hand-writing*, and also the *hand-writing of the subscribing witness Steele*.

**Henley v.**  
**Philips.**  
2 Atk. 48.

2. Where the witness who attests a bond *is dead*, it is not sufficient to prove his hand, it must also be proved *that he is dead*. This case, though in equity, is there said to be the same at law.

**ones v. Mason.**  
2 Stra. 833.

So where the subscribing witness had become *infamous*, by a conviction for forgery; on producing the record of the conviction, his hand was allowed to be proved by other witnesses as if he was dead.

“ In this last case the witness was incapacitated from “ being a witness, by act of law, in which case colla- “ teral evidence was admitted; and the case is the same “ in

" in matters of necessity, or where the witness is under  
 " any legal incapacity, either by his own means or other-  
 " wife."

As where the person who was *witness to the bond*, was af-  
 terward *administrator de bonis non to the obligee*, and brought  
 this action on it, and (being the plaintiff) was incapable of  
 being an evidence; proof of his hand-writing was held to  
 be good evidence, and letters from the obligor admitted in  
 evidence, which made mention of the bond.

Godfrey v.  
 Norris.  
 1 Stra. 34.

So where there were three obligors in a bond, and one  
 only was sued, the other was admitted as an evidence to  
 prove the execution of the bond by the defendant.

Lockhart v.  
 Graham.  
 1 Stra. 35.

" But the witness must prove the execution of the bond  
 " by the defendant himself."

For it is not sufficient to prove *that one who called himself*  
 J. S. (the obligor in the bond) executed it, if the witness  
 did not know him.

Memot v. Bates.  
 Hill. 4 G. 2.  
 Bull. N. P. 171.

3. Old deeds are held in law to prove themselves: however  
 in this case which was debt on a bond of thirty-two years  
 standing, and the plaintiff insisted on reading it without  
 proof of its execution, Lord Mansfield held, That there  
 should be some proof of its authenticity, as by payment of  
 interest, or by producing the attesting witness, if living; and  
 in this case, he being proved to be living, and not being  
 produced, the plaintiff was nonsuited.

Forbes v. Wale.  
 533.  
 2 Black. Rep.

## 2: In the case of Leases.

If the defendant insists that the lease declared on is not the  
 plaintiff's, the plaintiff may shew that it was made by one  
 who had authority from him to make it (as his attorney)  
 and the authority need not be produced.

Pér Holt, at  
 Maidstone;  
 1 Ann.  
 Bull. N.P. 171.

But where a man gives power to an attorney so to act  
 for him, the attorney cannot do it *in his own name*, nor as  
*his own act*, but in the name and as the act of his principal:  
 and if made otherwise, it is void.

Coombes's case.  
 9 Co. 75. 2 Ref.  
 Frontin v. Small.  
 1 Stra. 705.

## 3. In the case of Amercements.

In debt for an amercement, the declaration set out the  
*afforcement as made by George Wallace, Samuel Buckland, and*  
*Joseph Prior*: the court-books were produced, when it ap-  
 peared that the afforcement had been made by *George Wallace,*  
*Samuel Buckland, and Joseph Foster Prior*: it was objected  
 for the defendant that this was a variance; but it was over-  
 ruled.

Grey v. Wheat-  
 ley.  
 1777.  
 Sitt. Mic.  
 MSS.

ruled. The declaration further stated, that the defendant was summoned to serve on the jury for the *court leet* and *court baron*; and the summons produced in evidence was for the *court leet* only: Lord *Mansfield* said, This was a matter of strict law, being for a penalty; that the plaintiff was therefore bound to prove the averment as laid, and the summons did not prove it; therefore the plaintiff was nonsuited.

Turner v.  
Weaver.  
Hereford Sum.  
Ass. 1766. MSS.

So where in debt for an amercement in a *court baron*, the custom was alledged to hold a court twice in the year, where all the copyhold tenants ought to attend, and in case of non-attendance they should be amerced; the plaintiff's witnesses proved the custom to be, To attend personally at one court, and send their effoign-penny to the other. This was ruled by *Justice Gould* to be a fatal variance.

#### 4. In the case of Executors and Administrators.

Welburne v.  
Dewsbury.  
per Ch. J. Eyre.  
Hill. 12 G. 1.  
Bull. N. P. 140.

1. If the defendant pleads *plene administravit*, the plaintiff cannot upon this issue give in evidence a copy of the inventory delivered by the defendant to the spiritual court, unless it was signed by him, though it was signed by the appraisers: but he may give in evidence, that the defendant had assets; or if he gives an inventory in evidence, he may shew that the goods were undervalued.

Smith v. Davis.  
Mic. 10 Geo. 2.  
per Hardwicke  
Ch. J. Bull.  
N. P. 140.  
Ayliff v. Ayliff.  
Hill. 2 Geo. 2.  
C. B.  
Bull. N. P. 142.

So if the inventory produced, and containing the account of the debts due to the testator's estate, does not distinguish between the *separate* and *desperate* debts, it will be sufficient to charge the executor with the whole as assets, and put him to prove if any of them were desperate: As if the article was, "Item for debts due and owing, which I admit myself to be chargeable with when recovered."

Shelly's case.  
Balk. 296.

But all the *separate* debts are assets in his hands; for it is saying that he may have them for demanding, unless the demand and refusal be proved.

Taylor and Hol-  
man v. Roberts.  
Sittings after  
Trin. 1769.  
Bull. N. P. 169.

2. Where the plaintiff has taken a judgment of assets, *quando acciderint*, against an executor who had pleaded *plene administravit*, he shall not in a subsequent action against the executor, suggesting a *devastavit*, be allowed to go into evidence of assets having been in the defendant's hands before that judgment: for by so taking his judgment, he had admitted that the defendant had fully administered to that time.

Saunderson v.  
Nicholle.  
Show. 81.

3. If the defendant pleads *plene administravit* to an action of debt, it admits the debt; for it is for a sum certain: but



is otherwise in *assumpsit*, which is for a sum uncertain and in the form of *damages*; for there the plaintiff must prove his debt.

4. If to an action of debt on a bond, and *plene administravit* pleaded, the defendant offers proof of payment of another bond, he must prove that it was sealed and delivered (that is, was a complete deed intitled to priority); but if the action was on a simple contract, *payment of other debts is only necessary to be proved*; because if there was no bond, it is a good administration in that action; for the simple contract demands are in the same degree.

5. "As it was before observed, that by priority of action a right attached to the person who brought the action, by no artificial reference of the filing of the bill to the first day of term, shall the executor or administrator be injured."

For if to *plene administravit* the plaintiff replies assets at the time of his exhibiting his bill (viz. on the first day of term) if it appears in evidence, that the bill was not filed for some days after, the defendant shall have the advantage of shewing the true time of filing the bill, and he shall not be bound by the reference of it to the first day of term; but he shall be allowed all payments made before the real filing of the bill. Man v. Adams.  
1 Sid. 432.

But if to *plene administravit* the plaintiff replies assets at the time of suing out his original, viz. on such a day, and the defendant rejoins that he had no assets then, on which issue is joined, the plaintiff need not give in evidence a copy of the original to prove the time of its being taken out, because the defendant admits it by his rejoinder. Bull. N. P. 144

6. If an executor compounds with the creditors, and after, at the suit of any of them, pleads *plene administravit*, proof of the composition would be conclusive of assets, nor would the court suffer him to give evidence of no assets. Per Holt, Ch. J.  
Fanch. 4 Ann.  
Salk. MSS.  
Bull. N. P. 144.

7. In debt on a bond and *plene administravit* pleaded, the plaintiff proved payment of interest by the defendant executor from the testator's death, for four years, to the time of bringing the action: this was held to be good and admissible evidence for the plaintiff, but not conclusive. Cleverley v.  
Brett.  
Winton 8<sup>n</sup>.  
Aff. 1772.  
MSS. coram  
Just. Ashurst.

## 2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. In debt on a bond, the defendant pleaded that the money was lent from the 24th of August to the 24th of May, for a premium Titus v. Lady  
Preston.  
2 Stra. 654.

premium of 150 guineas ; on evidence, it appeared to be for *nine months*. It was objected, That there was a variance ; for the months should be lunar months, and so that the contract would not reach to the 24th of *May* ; but it was adjudged, " That the time should be governed by common understanding, which was calendar months ; and so that there was no variance."

Anon.  
Salk. 278.

2. In debt for rent, and *nil debet* pleaded, the defendant may give the *statute of limitations* in evidence ; for the statute is in the present tense, and so makes it no debt at the time of pleading ; but it is otherwise in *assumpsit*.

1 Sid. 151.

So, on the same issue, the defendant may give *entry and expulsion* in evidence.

Co. Litt. 283.

3. Upon *plene administravit* pleaded and *issint riens inter mains*, if it be proved that the defendant had effects of the testator's in his hands, he may give in evidence that *he paid to that value of his own money*, and need not plead it.

1 Mod. 174.

So he may, on this issue, give in evidence, That *he was but executor durante minore etate ; that he paid debts and legacies ; and that he had delivered over the residue of the testator's estate and effects to the infant when he came of age ;* for his power then ceases, and the new executor then becomes liable to actions : but he will be answerable for so much as he has wasted ; and the new executor has his remedy against him. It is said in this case, that he is not liable at other mens suits ; but in 6 Co. *Packman's case*, and *Latch*. 60, it is said he is : of which last opinion *Just. Buller* seems to be.

*Packman's case*.  
6 Co. 186.

The decision in *Packman's case* is, That if an administration be to one, which is afterwards repealed, and administration granted to another, that all dispositions and payments made by the first administrator, while his administration remains unrepealed, shall be good ; but if he wastes the goods, that any creditor may charge him in debt.

#### 4. OF THE VERDICT AND JUDGMENT.

Per Wild Just.  
Pitb.  
29 Geo. 2  
Bull. N. P. 178.

1. The jury, besides finding the debt, ought to give damages for the detention, which is usually one shilling, though under particular circumstances it may be more ; as where the principal and interest due on a bond exceed the penalty : in such case the jury ought to give the residue in damages, as well as in debt on a single bill. *Vid. 2 Term Rep.* 389.

And

And this is now settled, that the jury may so find, tho' contrary to the case of *White v. Sealy*, Dougl. 49. in which it is decided, That in debt on a bond, no more is recoverable than the penalty.

Ld. Lonsdale  
v. Church.  
2 Term. Rep.  
388.

2. "Where this action is founded on a contract for a specific sum, and that grounded on the agreement itself, the plaintiff can recover only that specific sum, and there can be no apportionment."

As where the plaintiff declared in debt, on an agreement to pay him 100*l.* *per ann.* for his trouble in collecting rents, and brought his action for 75*l.* for three quarters salary, and had a verdict for it in C. P. judgment was reversed: for it was an entire contract for a year's service, and there could be no apportionment for a less time.

Countess of  
Plymouth v.  
Throgmorton.  
1 Salk. 65.

This was the law as formerly held, viz. That in all cases of debt the plaintiff must recover the specific sum he went for in his declaration; but the law has been altered in respect to simple contracts.

Aylett v. Lowe.  
2 Black. Rep.  
1221.

And it is now settled, that in an action of debt on a simple contract, the plaintiff may prove and recover a less sum than he demanded by the writ. *Ante*, 206.

Mc Quillon v.  
Cox.  
H. Blackst. Rep.  
249.

"So though the debt is by specialty, if it depends on something extrinsic (as rent, *ex. gr.*) there the plaintiff may have a verdict for what is really due, though more is demanded."

Salk. 659.  
*per Holt*, C. J.

2. "But as a sum certain is always claimed, the verdict must go to the whole of it; that is, if the jury find part to be due, they must find *nil debet* to the rest."

Co. Litt.  
227. a.

For where, in debt, on a charter party, wherein the defendant covenanted to pay fifty guineas per month, and plaintiff declared for 500*l.* due on balance on that account, the defendant pleaded payment for all the time the ship was in his service, and issue being joined thereon, the jury found that 373*l.* remained unpaid; but said nothing to the rest of the 500*l.* This was in C. P. and judgment was reversed; for the jury had not answered to the whole demand, and so the defendant might be called upon again.

Hooper v.  
Shepherd.  
2 Stra. 1049.

3. If an executor pleads *plene administravit*, and issue is joined thereon, and the jury find that the defendant had goods in his hands, but do not find the value, the verdict is void for uncertainty.

Co. Litt. 227. a;

If the jury find assets in Ireland, it shall charge the executor; for such are assets every where, and the jury may enquire of them.

Richardson v.  
Dowell.  
Cro. Jac. 55.  
Dowdall's

2. AS Case, 6 Co. 46

## 2. AS TO THE JUDGMENT.

Courts of law formerly considered the *penalty* of the bond as the debt, and gave judgment accordingly. This drove the defendant into Chancery, where the decree gave only what was really due for principal, interest, and costs. For remedy of this it was enacted, by stat. 4 & 5 Ann. c. 16. "That in all actions brought upon bonds, in which is a condition or defeasance to be void on payment of a lesser sum at a day certain, if the defendant shall bring into court all the principal, interest, and costs of such, the money so brought in shall be deemed a full discharge, and the court shall give judgment accordingly."

Under this statute it has been held,

*Bridges v. Williamson.*  
2 Stra. 814.

1. That where the bond is to pay a sum of money by instalments, upon failure of payment of any, and action brought on the bond, the defendant may, under the statute, bring the arrears, &c. of the last instalment into court.

*Darby v. Wilkins.*  
2 Stra. 957.

But where the bond is in that form, and default made in the payment of any of the instalments, the plaintiff may sign his judgment for the whole sum, but not take out execution till the instalments become due.

*Masfen v. Touchet.*  
2 Black. Rep. 706.

So where the bond was for a sum of money payable at the end of three years, but the interest by half-yearly instalments: On default of payment of one half year's interest, the court allowed the plaintiff to sign judgment for the whole sum, though not then due, but with stay of execution on payment of the interest then due.

"But in these cases the bond must be simply for the payment of money by instalments."

*Gowlett v. Hanforth.*  
2 Black. Rep. 958.

For where it was so reserved, but there was a further condition, "That if any of the instalments was unpaid, that then the bond should stand in full force for the principal and the interest then due." Default being made, the court refused to stay proceedings on payment of what was due for the instalments, but gave judgment for the whole money then unpaid.

*Bonafous v. Rybot.*  
3 Burr. 1370.

So where a bond was for payment of a sum of money at a day certain, and the parties agreed that it should be paid by instalments, and the agreement contained a defeasance, which was to be absolute if the payments were regularly and punctually made; if not, to be void; default being made

in payment of one instalment, the court held the defeasance void, and that the plaintiff might have judgment on the first bond for what was done.

2. The bail in any action are only liable to the debt sworn to and costs, not to the sum recovered by verdict, if more. *Martin v. Moor*, 2 Stra. 922. *Dougl.* 316.

This is the case in the *King's Bench*, but in the *Common Pleas* the bail are liable to the whole extent of the penalty; that is, to double the sum sworn to. *Mitchell v. Gibbons*, H. Black. Rep. 76.

So in the *King's Bench*, the bail in error are not liable beyond the original judgment and costs; that is, not to interest from the time of such judgment to its affirmance in the *Exchequer Chamber*; but they are liable to the interest subsequent to the affirmance of the judgment. *Frith v. Leroux*, 2 Term Rep. 57.

3. If there is a judgment against two, and one of them dies, the plaintiff may have execution against the survivor. *Edgar v. Smart*, Sir Th. Raym. 26.

## CHAPTER III.

## The Action of Covenant.

**C**OVENANT is an action brought for the recovery of damages, for breach of any agreement entered into by deed between the parties.

F. N. B. 240.

This agreement must always be by deed ; but the action lies equally whether it be by *indenture* or *deed-poll*.

Foster & Willson  
v. Mapes.  
Cro. Eliz. 212.

So if the agreement is by indenture, it is sufficient to maintain the action against the covenantor that *he* has sealed it and delivered it to the covenantee, though the covenantee himself never sealed it.

Covenants are either *in deed* or *in law*.

1 Co. 85.

*Covenants in deed* are such as are expressly mentioned and recited in the agreement between the parties.

*Covenants in law* are such as the law raises or implies, though not expressed ; as if the lessor *demises* to the lessee by deed for a certain time, the law always implies a covenant on the lessor's part, that the lessee *shall quietly enjoy during the term*.

Covenants again may be considered with reference to the object : as *real* or *personal* ; that is, annexed to the *land*, or merely to the *person*.

In treating of this action, I shall consider it, 1. With reference to the contract or agreement : 2. With reference to the person : 3. The pleadings : 4. Evidence : 5. The verdict and judgment.

## I. OF COVENANT WITH REFERENCE TO THE CONTRACT.

Under this I shall consider, 1st. The creation of covenants. 2dly, The construction of covenants. 3dly, Covenants secured by bond. 4thly, What shall be a breach of covenant.

## I. OF THE CREATION OF COVENANTS.

1. There is no need of the word *covenant*, nor of *any particular form of words* to constitute a covenant in deed; for any thing under the hand and seal of the parties *importing an agreement* shall support this action, as amounting to a covenant. 1 Roll Abr. 518.

As in the case of a lease of lands, in which are the words "yielding and paying" so much rent: this is a covenant, and this action lies for the non-payment; for it is an agreement for the payment of rent, which amounts to a covenant. 1 Roll Ar. 519.  
1 Vent. 10.

So where in a lease of mills were these words, "And the lessee shall repair the mills;" these words were held to make a covenant, for it was the clear agreement of the parties; and being by indenture, it is the words of both. Brett v.  
Cumberland.  
Cro. Jsc. 399.  
Poph. 136.

So in indentures of apprenticeship, where there are no formal words, but only an agreement that the master shall do this, and the apprentice that; yet it is a covenant on both sides. Walker's case.  
Roll Abr. 519.

"But where the word *covenant* is wanting, the words must *import an agreement*, or the action will not lie."

As if the lessee for years covenant to repair, &c. provided always, and *it is agreed*, "That the lessor shall find timber:" this makes a covenant on the part of the lessor, and is a qualification of the covenant of the lessee. But if the words had been only "That the lessee would repair, provided always that the lessor should find timber," (without the words "it is agreed") this would create no covenant on the part of the lessor, but would be a condition precedent the performance of the lessee's covenant to repair. Holder v.  
Taylor.  
1 Roll Abr. 518.

2. "Covenants in law differ in this respect from covenants in deed, that the thing to be performed in the case of covenants in deed is founded *on the words* which express what is to be done (as yielding and paying, imply covenants to pay rent); but covenants in law do not follow the words, but are the implications of law raised from the express covenants, and required to be performed as necessary to the enjoyment of the express covenant."

As in the case of leases for years by the words "*concessi dimisi*:" These words import a covenant in law on the part Nokes's case.  
4 Co. 80.  
Carth. 98.

part of the lessor *that he has a good title*, and therefore if the lessee is evicted, he may maintain an action of covenant: for by reason of the defect of the lessor's title, he could not enjoy the demise which had been made to him.

Andrew's case.  
Cro. Eliz. 214.

So upon the words *concessit & ad firmam tradidit*, covenant lies against the lessor if he enters: *aliter* if a stranger enters, unless there is an express warranty.

3. "A recital of an agreement in the beginning of a deed shall create a covenant upon which this action will lie."

Barfoot v.  
Picard.  
3 Keb. 465.

As where on the demise of a coal-mine, it was recited, "That before the sealing of the indenture it had been agreed that the plaintiff should have the third part dug, &c." On an action of covenant being brought on this, it was objected, That there was no covenant that the plaintiff was to have the third part. But, per *Hales*, were it but a recital, that before the indenture they were agreed, it is a covenant; so to say, "whereas it was agreed to pay 20*l.*" for now the indenture confirms the former agreement by such declaration, and makes it a covenant.

Severn v. Clark.  
1 Leon. 122.

So where the defendant by deed-poll reciting, That he was possessed of certain lands for years by good and lawful conveyance, assigned the same with divers covenants and agreements, and gave bond for performance, it was resolved, That the recital was to be held as within the condition of the bond, and that if he had not the interest in the lands as recited by good and lawful conveyance, that the bond was forfeited.

4. "Where a covenant refers to a preceding instrument upon which it is founded, that instrument shall determine the covenant; that is, the covenant shall extend as far as the instrument, and no farther."

George v.  
Butcher.  
2 Vent. 140.

As where the defendant married *Rebecca Morse*, widow, who had issue by a former husband, *John, Samuel, Daniel*, and *Nathaniel*; to all of whom, *except Nathaniel*, their father had left by will 50*l.* The defendant, before the marriage took place, reciting the said will as it was, covenanted to pay the legacies devised by it, viz. 50*l.* to *John, Samuel, Daniel*, and *Nathaniel*. On covenant brought, the defendant pleaded performance, viz. 50*l.* to *John, Samuel*, and *Daniel*; and the plaintiff demurred for cause that he had not paid 50*l.* to *Nathaniel*, according to his covenant; but it was adjudged That as the covenant was to pay the several legacies bequeathed by the will, that that should rule the extent of the covenant; and as no legacy was in the will given to *Nathaniel*, he should recover nothing.

5. "Bu



## COVENANT.

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5. "But where a covenant is founded on a conveyance of an estate; if the estate intended to be conveyed is void, the covenant is void also."

As where the conveyance was "a grant of so much of a term as should be unexpired at the death of A." and covenant for quiet enjoyment and bond. This conveyance being void, on account of the uncertainty of the time of its commencement and end (*Co. Litt. 45. b.*) the covenants were adjudged to be void, as they depended on the estate.

Capenhurst v. Capenhurst.  
Sir T. Raym.  
27.

"But it is otherwise where the covenant is independent of the estate, as to pay money," &c.

As where the plaintiff declared, that the defendant by his deed did grant, bargain, and sell to the plaintiff and his heirs, provided that if the grantor paid so much money, that it should be lawful for him to re-enter, and that he covenanted to pay the money, and breach assigned the non-payment of the money; nothing in fact passed by this deed for want of enrolment, and it was therefore argued on the authority of the last case, that the action would not lie; but it was held by *Chief Justice Holt*, That in the last case the covenant referred to the estate, and was to wait on it, and that therefore if no estate was granted or passed, the covenant failed; but that in this case the covenant was separate and independent, and it was not material whether any estate passed or not; and the plaintiff had judgment.

Northcote v. Underhill.  
Salk. 199.

### 2. OF THE CONSTRUCTION OF COVENANTS.

1st. Of Covenants in general. 2dly, Of special ones usual in conveyances.

#### 1. Of Covenants in general.

1. "The distinction between the construction of covenants implied by operation of law, and express covenants, is, That express covenants are taken more strictly; and a man may without consideration enter into an express covenant by hand and seal, to the performance of which he is at all events bound."

Per Lord Mansfield, in Shubrick v. Salmon.  
3 Burr. 1637.

As in this case, where a master of a ship, by charter-party, covenanted to be at Carolina by a certain time, though it appeared that it was impossible that he could be there at the time, from storms and other causes; yet it

Shubrick v. Salmon.  
3 Burr. 1637.

was

was held that he was bound to go at all events, and to be liable on the covenant.

"For where the covenant is express, there must be an absolute performance, nor shall it be discharged by any collateral matter whatever."

*Monk v. Cooper.*  
2 Str. 763.

As where in covenant for a year's rent from *Michaelmas* 1725 to 1726, the defendant shewed upon oyer of the lease, that he as lessee by covenant was bound to repair in all cases except fire, and then pleaded, that before *Michaelmas*, 1725, the premises *had been burned down*, and not rebuilt by the plaintiff during the whole year, *so that he had no enjoyment for the whole time claimed*. But on demurrer, the plaintiff had judgment; for the covenant to pay rent was absolute, and if the defendant had any injury, he should have his remedy, but could not set it off against the demand for rent.

But note these exceptions:

*Salk.* 198.

1. If a man covenants to do a thing which then is lawful, and a statute comes which declares it unlawful, or hinders him from doing it, the covenant is annulled by the statute.

2. If a man covenants not to do a thing which it was then lawful for him to do, and a statute comes which compels him to do it, the statute repeals the covenant.

3. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful; yet shall the covenant remain unrepealed.

2. "Covenants are to be construed so as to have effect, and correspond with the intention of the parties at the time of making them; therefore a performance according to the letter, and not according to the spirit of, the covenant, is not a legal performance."

*Teat's case.*  
*Cro. Eliz.* 7.  
*Robinson v. Aunts.*  
1 Sid. 48. S. C.

As where the condition of a bond was, that the defendant should before a certain day deliver to the plaintiff a bond, wherein the plaintiff was bound to the defendant. If before that day the defendant sues the plaintiff on the bond, and recovers, though at the day he delivers it up, yet it is no performance, for it could not be the intention of the parties that it should be put in suit.

"But if the covenant is once well performed, though by subsequent act it becomes of no effect, yet it is a sufficient performance."

*Leigh & Hammer's case.*  
1 Leon. 52.

As if a man be bound that his son (who is then an infant) shall before such a day levy a fine, or (being *infra*

*annos nobiles*) shall marry B.'s daughter before such a day, and before such time the son levies the fine or marries the daughter, and the fine is afterward reversed for error, or the son when he comes of age disagrees to the marriage, yet is the covenant well and sufficiently performed.

3. "But where there is any doubt as to the construction of a covenant, it is a rule, *"that it is to be taken in that sense which is most strong against the covenantor, and beneficial to the other party."*

Therefore, where the defendant covenanted with the plaintiff, that if he would marry his daughter, that he would pay him 20*l.* per ann. without saying for how long, it was held that it should be for the *life of the plaintiff* (the grantee) and not for one year only. For such construction was most beneficial to the grantee, and against the grantor.

Hookes v. Swain.  
1 Lev. 102.  
1 Sid. 151.

"Therefore covenants being intended for the benefit of covenantees, by no act shall the covenantor be allowed to defeat the effect of his own covenant."

As where the defendant covenanted, "That the plaintiff should have all the grains made in the defendant's brewhouse for seven years," and the breach assigned was, that the defendant *had put hops into the grains, by which they were spoiled*, and the cattle would not eat them. The action was held well to lie; for the intention of the parties was, that the plaintiff should have the benefit of the grains, which by this means were useless.

Griffith v. Good-hand.  
Sir T. Raym.  
464.  
Sir Tho. Jones  
191.

So if I covenant to leave all the timber which is growing on the land when I take it, and at the end of the term *cut it down, but leave it there*, it is a breach of the covenant.

4. "No covenant shall be construed to a greater extent than the words import."

1. In point of *time*.

1. In covenant, the plaintiff declared, on an indenture in which it was recited, "That whereas Lord *Arlington* had appointed *T. Jenkins* to be his deputy-postmaster for six months next ensuing, and the said *T. Jenkins* covenanted, that during the time he should continue postmaster, he would execute the office, and well and truly pay over such monies as he should receive," &c. &c. The defendant pleaded performance, and the plaintiff replied, That the said *Jenkins* had continued deputy-postmaster for two years after, and such a day in that time received so much, and

Lord Arlington v. Merrick.  
2 Saund. 411.  
3 Keb. 45.

and had not paid it over. *Per Cur.* No action of covenant will lie; the indenture limits the time to six months, during which the covenant continues, which being expired, the continuance must be on a new agreement, not on the first indenture; and the time mentioned, "during which he should continue, &c." refers only to the six months.

2. Nor to take in *more persons*, or *different* from those mentioned in the covenant.

Woodrooff v.  
Greenwood.  
Cro. Eliz. 517.

As where tenant in tail, reversion to the Queen in fee, let for twenty-one years, and covenanted that the lessee should enjoy "against all persons except the queen, her heirs or successors, being kings or queens of *England*;" the Queen granted by patent her reversion to *Wentworth*; tenant in tail died without issue, and *Wentworth* entered; upon which the plaintiff (the lessee) brought an action of covenant, and it was held well to lie, for this covenant did not extend to the *patentee* of the Queen.

3. "Nor to vary *the duty* to be performed."

City of London  
v. Greyme.  
Cro. Jac. 182.

For where the city of *London* covenanted, "To find eight men to grind every day in *Bridewell* dock, and that if they failed in any part, that the defendants should retain so much *per man* out of the rent" (the city being lessors of the house). The defendants pulled down the corn-mill and erected an horse-mill, and then wanted to deduct so much as was the allowance for the eight men; but it was adjudged, That it could not be done, for *by the change of the subject* the covenant was discharged.

Stephens v. Car-  
rington.  
Douglas 26.

So where, on a dissolution of partnership between the plaintiff and the defendant, who were wharfingers, there was a covenant, "That the plaintiff should have a moiety of the goods, and that each should bear an equal share of the expence of weighing and dividing; but that the plaintiff should solely bear the charges and expence of conveying his moiety of the goods to a warehouse he had taken." The breach assigned was, "That the defendant *had not delivered* the moiety of the goods;" and on demurrer the defendant had judgment; for there was no part of the covenant *to deliver*, and therefore no action lay on it: though it had been otherwise if the defendant *had obstructed* the plaintiff in removing the goods.

4. "The operation of a covenant must therefore be confined to that only which is in being at the time of the covenant."

Davenant v.  
Bishop of Sarum  
2 Lev. 68.  
1 Vent. 223.

As where in a lease made by the bishop, was that covenant usual in bishops leases, "to pay all taxes;" this shall  
no

not be construed to extend to any taxes *but such as were in being and use before*; that is, synodals, procurations, tenths, and subsidies, and not to any charges or taxes *after imposed, or of another nature*.

5. Express covenants shall qualify the generality and extent of covenants in law. Noke's case.  
4 Co. 80.  
4 Ref.

6. Where the covenant is for any thing which is either contrary to law, or such as is contrary to good policy to support, this action cannot be maintained.

Of this description are covenants in restraint of marriage, or in restraint of trade. *Vid. chap. 2.* Lowe v. Peers.  
4 Burr. 2225.

### 2dly. OF PARTICULAR COVENANTS USED IN CONVEYANCES.

These are, 1st, To pay rent. 2dly, For quiet enjoyment, 3dly, To save harmless from all persons claiming title. 4thly, Not to assign. 5thly, For repairs. 6thly, For further assurance. 7thly, To pay taxes. 8thly, Not to plough meadows.

#### 1. Of the Covenant to pay Rent.

Where the lessee *covenants generally to pay rent*, though he has had no enjoyment of the premises, as *where they were burned down*, and there was a covenant to repair in all cases except that of fire, yet shall the tenant be liable for all growing arrears of rent under his covenant. Balfour v. Weston.  
1 Term Rep. 310.

#### 2. Of the Covenant for Quiet Enjoyment.

1. Where there is a covenant for quiet enjoyment, this shall not extend to a *tortious ejectment or eviction by a stranger*, because that for this wrong the lessee may have his remedy by action against the stranger himself; but if the lessee be ejected by the lessor himself, there the lessee may have covenant. Tiddale v. Sir William Essex.  
Hob. 35.  
Cro. Eliz. 213.

But if the stranger claims *by elder title* than the lessors, the lessee may have covenant against the lessor; for he then can have no redress against the stranger, whose title is good in law. F. N. B. 342.

2. It is said, that if the lessor undertakes expressly that the lessee shall enjoy during the term, "*quietly, peaceably, and without interruption*," this will extend as a covenant against *tortious ejectments whatever*. Arg. Dyer. 328.  
Hob. 35.

T

But

Dudley v.  
Folliott.  
3 Term Rep.  
584.

But this seems not to be law; for in this case where on the sale of lands in *America*, the defendant covenanted that he had a good title, and "that the grantee should enjoy *without* the let, interruption, &c. of the defendant, and his heirs, and of *and from all and every other person or persons whomsoever*." The lands in question were seized as forfeited, by the States of *America*, and on covenant being brought on the eviction, the court declined going into the question respecting the legality of the seizure, *America* being then declared independent, but seemed to be of opinion, that a covenant, even extensive as the words in this case, should not extend to a tortious eviction by any person.

Arg. Hob. 35.

However, though the general covenant to save harmless, or for quiet enjoyment, does not extend to the tortious acts of a stranger, yet the lessor may covenant against *the acts of a particular person or persons*; in which case covenant will lie, in case of a tortious ejection by them.

Perry v.  
Edwards.  
1 Stra. 400.

Therefore where the plaintiff declared, that the defendant had sold a quantity of goods to her testator, which had been arrested at *Archangel* by one *Bell*, and that the defendant covenanted to save him harmless from any costs or charges relating to such seizure, and then averred that *Bell* having arrested those goods, that the testator was put to an expence of 1500*l.* respecting such arrest, which the defendant neglected to pay; it was resolved, That though *Bell's* act might have been tortious, yet that the defendant having expressly covenanted to save the testator harmless against it, that he should be liable.

3. "The breach of this covenant must be by *some act* inconsistent with the covenant."

Whitcomb &  
alt. v. Nine.  
1 Brownl. 81.

For where the covenant was for quiet enjoyment, without let, trouble, or interruption; and the breach assigned was, that the lessee having underlet, *the lessor had forbid the tenant to pay his rent*: it was held to be no breach; for there was no act causing a breach.

Gervis v. Peade.  
Cro. Eliz. 615.

So where a tenant for life made a lease for twenty-one years, by indenture, and covenanted, "That he had not done any act to prejudice the said lease, but that the lessee should enjoy it against all persons." The tenant for life died, and his lessor entered: on which the lessee brought covenant against the executor of the tenant for life; and it was adjudged, That it lay not; for the last words, *that the lessee shall enjoy it against all persons*, refers to the

the first words, *for any act done by him*; and so the covenant was not broken.

But an act of a servant who enters by command of his master, shall be a sufficient breach within this covenant.

Scaman v. Browning.  
1 Leon. 157.

4. But where the covenant is for quiet enjoyment against the lawful let, suit, entry, or eviction of the covenantor himself, his heirs and assigns, a disturbance by him, if done under a claim of right, is a breach of covenant: as here where it was by locking up two pews in a church, which had been parcel of the demise on which the covenant was made: and the grantor shall not be admitted to say that the act was *tortious*, and so not within the covenant; neither in this case need the declaration express the disturbance to be under a claim of right, it clearly appearing to be so.

Loyd v. Tomkins.  
Pasc. 27 Geo. 3.  
B. R.  
Term Rep. 671.

5. "This covenant for quiet enjoyment is usually from any acts of the lessor, or any claiming under him. Those who claim under him are those *who come in privity of title*, as heir, executor, assignee."

But there are others to whom this covenant extends.

As in this case, where *feme covert* seized in fee, she and her husband levied a fine to the use of the husband for life, with power to make leases with the usual restrictions, remainder to trustees to secure the wife's jointure, remainder over, with a joint power of revocation during their joint lives, and to declare new uses. They did revoke and declare new uses, taking away all the uses which followed the husband's estate for life, and leasing power, and limiting new uses to the wife for life, and after several intermediate remainders, to Lord Tankerville in tail. After this new declaration of uses, the husband made the lease in question with the covenant for quiet enjoyment against him, and *all claiming under him*. Lord Tankerville having evicted the lessee, covenant was adjudged to lie against the executors of the husband; for though the estate moved from the wife, yet *the husband's assent being necessary to the declaring of the new uses*, Lord Tankerville was a person claiming under him, and so within the covenant.

Hurd v. Fletcher.  
Doug. 43.

### 3. Of the Covenant to save harmless.

"The covenant is similar in its nature to that for quiet enjoyment, and the law as to it is the same."

Perry v. Edwards.  
1 Stra. 480.

Therefore this covenant is not broken by the tortious act of any one not claiming under the lessor.

Cowper v. Pol-  
lard.  
1 Roll. Abr.  
433.

\* For where the lessee of a term rendering rent, assigned it to J. S. and J. S. covenanted to save the lessee harmless of all rents payable to the lessor, and afterwards J. S. let part of the land to the first lessee, and his hay was there distrained for rent-arrear; this was held to be no breach of the covenant; for the distress of the hay was unlawful (it being before *ft. W.* 3.) and a trespass; and the sufferance of the rent to be in arrear, was no breach of the covenant without actual damage.

#### 4. Of the Covenant that the Lessee shall not alien or assign.

Cruce ex dem.  
Blencowe v.  
Bulby.  
3 Will. 234.

1. Where the covenant was to that effect, "That the lessee should not assign, transfer, or set over the said premises, or any part thereof," and the lessee made a lease for part of the time, it was adjudged, that such under-lease was no assigning, transferring, &c. and so was no breach of the covenant.

Pultney v.  
Holmes.  
1 Stra. 405.

2. So where the lessee made a lease of his whole term, but reserved the rent to himself, it was held to be no assignment, but an under-lease, though lessee parted with his whole term.

Fox v. Swan.  
Style 483.

3. So where the covenant was, "That the lessee should not assign over his term without the lessor's consent first had in writing, and the lessee devised the term without any such consent obtained;" this was held to be not such an assignment as was a breach of covenant.

Arg.  
3 Will. 236.

4. So any assignment by act of law is not a breach of this covenant, as if the lessee become a bankrupt, an assignment under his commission is not a breach of the covenant.

Doe ex dim. Ld.  
Stanhope v.  
Skegga.  
Tr. 21 G. 3.  
B. R.

Though this is so laid down in the last case, the point seems not completely settled; for in this case where the question was, Whether in case of such a covenant, an executor could assign for to carry into execution the purposes of the will? the court were equally divided.

"But where such assignment is not necessary, the executor or administrator shall be strictly bound by such a covenant."

Roe ex dim.  
Gregson v. Har-  
rison.  
Pas. 23 G. 3.  
2 Term Rep.  
425.

For where the covenant in a lease was, "That the lessee, his executors, administrators, or assigns, should not set, let, or assign over the whole premises demised, or any



any part of them, without *leave in writing* first had and obtained," under penalty of forfeiting the term, and the *lessee's administratrix did under-let for part of the time*; this was held to be a forfeiture, and that *leave by parole* was not sufficient.

5. So where the covenant was not to assign the whole or any part of the lands demised, without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; this was held to be a breach of the covenant, notwithstanding the lessor's entry. *Collings v. Silly*, Style 265.

6. If the lessee is bound not to alien or assign, without licence, *if that licence is obtained*, and an assignment takes place, *the assignee is not bound by the covenant, but may alien without licence again obtained* ever after; for by the licence the condition is gone and dispensed with. *Dumport's case*, 4 Co. 119.

So if a forfeiture has incurred by assignment, if the lessor accepts rent afterwards, it is a waiver of the forfeiture; but in such case it must appear, that at the time he accepted the rent he knew of the forfeiture incurred, as otherwise he shall not be bound. *Term Rep.* 430.

## 5. Of the Covenant for Repairs, and to deliver up in good plight as the Lessee received the premisses.

1. If the lessee covenants to keep an house in repair, and leave it in as good plight as it was at the time of making the lease; in this case the *ordinary and natural decay* is no breach of covenant; but the lessor is bound to do his best to keep it in the same plight, and so should keep it covered. *Fitzh. Abr.* title, Covenant, fol. 4.

And where there is this covenant on the part of the lessee, *if he pulls down houses, or suffers them to decay*, no action will lie against him *till the end of the term*; for before that time he may repair them: but if he *cuts down timber or trees*, covenant lies immediately, *for such cannot be replaced in the same plight*, at the end of the term. *F. N. B.* 342.

2. "A general covenant to repair, and to deliver up in repair, shall extend to whatever erections or buildings shall be raised during the term."

For where on a demise of three messuages for forty-one years, the lessee covenanted "to build *three houses* in the *room of those which were then standing*, to maintain the houses so to be erected, and to deliver them up in sufficient *Douglas v. Earle*, 3 Lev. 264. 2 Vent. 126. 8. C.

ficient repair." The lessee erected *five houses*, and at the end of the term *left one of them out of repair*: covenant was adjudged to lie; for the covenant to leave in repair should extend to all.

Beale v. Taylor.  
1 Leon. 237.  
1 Ld. Raym.  
440.

3. It has been held, that if the lessor covenants to repair during the term; if the lessor will not do it, the lessee may repair and pay himself by way of retainer: but *Holt, Chief Justice*, doubted of this, unless there was a covenant to deduct the expence of the repairs from the rent.

Prettyman v.  
Thoras.  
quot. 1 Sid. 423.

4. If the covenant is, "It is agreed that the lessee shall keep the house demised in good repair, *the lessor putting it in good repair*," covenant lies against the lessor on these words, if he does not put it into repair.

## 6. Of the Covenant for further Assurance.

Rosewell's case.  
5 Co. 19, a.

1. "If the covenant is, "That the party shall make such further assurance to the lessee or purchaser, as his counsel shall devise," in this case the *lessor or purchaser himself cannot devise the assurance*; for then it would be no plea to say, *quod consilium non dedit advisamentum*; but the *counsel* should devise it.

Higginbotham's case.  
5 Co. 19.

And where the covenant is the same as the last case, the *counsel should not give the advice or notice of the assurance* he had devised, immediately to the *lessor or bargainer*; but he should give it to his client the lessee or bargainee, who should communicate it to the party who was to make it.

Bennet's case.  
Cro. Eliz. 9.

2. If *A.* covenanted with *B.* to make such assurance as *B.*'s counsel should advise; 1st, *B. must give notice of the assurance*, otherwise *A.* could not know how to make it; 2dly, *B. is to give the assurance to A. for his perusal*, and to take advice on it, and *A.* is to have convenient time to perfect it.

Pierpoint v.  
Thimbleby.  
1 Rol. Abr.  
441.

3. If the covenant be to make further assurance at all times at the charge of the covenantee, the covenantor shall have a reasonable time to do it, after having notice of what is intended.

## 7. Of the Covenant to pay Taxes.

Cranston v.  
Clark.  
Bayes Rep. 78.

1. In this case, the rent was reserved in the lease to be paid, *without any deduction or abatement whatsoever*; it was nevertheless resolved in this case, that as by the land-tax act the tenant is enabled to deduct the land-tax out of his rent,

rent, that he has a right in all cases so to stop it out of the rent to his landlord, unless there is an express agreement that he should not.

2. Where there is the covenant usual in leases that the tenant shall pay all taxes (*the land-tax only excepted*) under this clause the landlord is only bound to allow the land-tax at the rate and in proportion to the rent, at the time of the demise, not for any increase on account of the improvement of the estate; in this case on a building lease, the land-tax at the time of the lease made was 3*l.* 8*s.* but in consequence of houses being built, an addition was made to the land-tax of 5*l.* 12*s.*: it was adjudged, That the lessor was only obliged to allow the 3*l.* 8*s.* the assessment when the lease was made. Hyde v. Hill.  
3 Term Rep.  
377.

8. Not to plough Meadow, and to use and deliver up the Land in an husband-like manner.

In this case it was decided, That this covenant shall only extend to what was really meadow at the time of the demise; and if the land is described in the lease under the title of meadow, which in fact is then arable, the tenant shall not be estopped by the words of the lease, to prove it not to have been meadow. Skipwith v.  
Green.  
1 Stra. 610.

2. In covenant on a lease whereby the defendant covenanted to use the land in an husband-like manner, and to deliver it up in like condition. In summing up to the jury, Justice Buller laid it down, That it was matter of law to determine what was using the land in an husband-like manner, and gave it as his opinion, that under such a covenant the tenant ought to use on the land all the manure made there, except that when his time was out, he might carry away such corn and straw as he had not used there, and was not obliged to bring back the manure arising from it. Watson v.  
Welch.  
Taunton Lent  
Ass. 1785, MSS.

### 3. OF COVENANTS SECURED BY BOND OR PENALTY.

1. "There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter the obligee has his election to bring an action of debt for the penalty, after a recovery of which he cannot again resort to the covenant; because the penalty is a satisfaction for the whole: or he may waive the penalty, and proceed on the covenant, and recover more or less than the penalty *toties quoties*." Per Lord Mansfield in Lowe v. Peers.  
4 Burr. 2225.

Another

Another distinction is, where the penalty is only in *nature of punishment*, or in *terrorem*, and where it makes part of the agreement as a compensation.

4 Burr. 2228.  
Rolle v. Peter-  
son.  
6 Brown Cal.  
Parl. 470.

As if the covenant be "not to plough meadow," and there be a penalty of 50*l.* an acre, there a court of equity will relieve; for there the penalty is as a punishment: but if the covenant had been "to pay 5*l.* for every acre of meadow ploughed," this is part of the agreement, and there is no alternative; it is the particular liquidated sum agreed upon by the parties, and is the proper *quantum* of the damages which the jury ought to find.

Lowe v. Peers.  
Ibid.

And therefore where the covenant was by the defendant, not to marry any one except the plaintiff; and if he did, that he would pay her 1000*l.* this sum, it was held, should be the settled *quantum* of the damages to be found by the jury.

Brigstock v.  
Stannion.  
1 Lord Raym.  
107.

2. A difference is also to be observed between assigning a breach on an action of covenant and in debt on a bond for the performance of covenants: That in covenant it is sufficient to assign the breach *in the words of the covenant*; because all is recoverable in damages, and there shall be what the plaintiff can prove he has sustained; but in debt on the bond a *certain breach* must be assigned.

Co. Litt. 282. a.

Though if the *substance of the breach* so assigned is proved, it is sufficient, though not precisely as laid: as bond by the lessee not to cut trees, and breach assigned in cutting *twenty trees*, proof of the cutting of *ten* will support the action; for the cutting the trees is the substance.

3. At common law, if debt was brought on a bond for performance of covenants, the plaintiff could assign but a single breach. But if the action was covenant, he might assign as many as he pleased.

But it is now enacted by statute 8 & 9 W. 3. c. 10.  
"That in debt on a bond or penal sum, for performance  
"of covenants, the plaintiff may assign as many breaches  
"as he pleases, and the jury shall assess damages for such  
"as have been broken: and in case of judgment on de-  
"murrer, or by *nihil dicit*, the plaintiff may suggest upon  
"the roll as many breaches as he shall think fit, upon  
"which a writ of inquiry shall go: but the defendant  
"may pay all damages and costs, &c. and then there shall  
"be a stay of execution; but the judgment shall still re-  
"main as a further security to answer the plaintiff such  
"damages as may be sustained for further breach of any  
"covenant

## COVENANT.

"covenant in the same indenture, upon which the plaintiff may have a *scire facias toties quoties*."

The reason of enacting this statute was this: That at common law the party might bring debt, and recover the whole penalty, which, as it often exceeded the real damage, the other party was driven to equity for that relief which this statute gives.

These decisions on the statute have therefore taken place:

1. If debt is brought for the penalty, and *issue joined* on *Drage v. Brand*, *nil debet*, the jury should not give a verdict for the whole, <sup>2 Will. 377.</sup> but *assess damages for each breach assigned*; and therefore, where, in this case, the plaintiff took a verdict for the whole penalty, a *venire facias de novo* was awarded.

2. But where there is judgment *on demurrer* (or *nil dicit*) <sup>Goodwin v. Crowle. Cowp. 357.</sup> there the plaintiff must have judgment for the whole penalty; but he cannot take out execution for the whole, but must sue out a *writ of enquiry*: but the judgment still remains as a security for further breaches.

And *Note*, 1. That if a bond is for performance of covenants, that it is forfeited by a breach of a covenant in law; as if the lessee is evicted out of the premises demised. <sup>Nokes's case. 4 Co. 80. 2 Ref.</sup>

2. If a man covenants to enter into a bond to the lessee for the enjoyment of certain lands demised, and does not express what the sum shall be, he shall be bound in such a sum as is equal to the value of the land. <sup>In Samon's case. 3 Co. 78. a.</sup>

### 4. WHAT SHALL BE A BREACH OF COVENANT.

Under this head I shall consider at what time a breach of covenant may be committed; and, 2dly, In what manner.

1. As to the time.

"Covenants considered with respect to the Time of Performance are of three Kinds:

1. "Such as are mutual and independent, where either party may recover damages from the other for the injury he may have received from a breach of the covenants in his favour, and where it is no excuse for the defendant" <sup>Doug. 665.</sup>

"defendant to alledge a breach of the covenants on the  
"part of the plaintiff."

French v.  
Trewin.  
3 Ld. Raym.  
124.

As here where the plaintiff declared, on a covenant between his testator and the defendant, "That the testator should assign to the defendant an house, and that the defendant should pay 30*l*:" and the breach assigned was, "That the defendant had not paid the 30*l*." He pleaded, That the testator had not assigned; and on demurrer it was held, That these covenants were mutual and independent, and the parties might have reciprocal actions: so that the plaintiff's action lay before the assignment.

Boone v. Eyre.  
2 Black. Rep.  
1312.

So where the plaintiff declared in covenant on the sale of an estate by him in *Dominica* in consideration of 500*l*. and an annuity of 160*l*. *per ann*. and the defendant covenanted with the plaintiff "that he, the said Boone (the plaintiff) well, truly, and faithfully doing, fulfilling, and performing the several agreements, covenants, &c. that he the defendant would well and truly pay the said annuity;" the breach was for two years and a half arrears of the annuity. It was adjudged that these were mutual covenants, and not one a condition precedent the performance of the other, and so that one could not be pleaded in bar of the other. *Per De Grey, Ch. Just.* Where the participle "doing, performing," &c. is prefixed to a covenant, it is clearly a mutual, and not a condition precedent.

2 Saund. 155.

Of this first species of mutual covenants, and which best shews their nature, are those where there is a *negative covenant* on one part, and an affirmative on the other, in consideration of the performance of the negative.

Hunlock v.  
Blacklow.  
2 Saund. 155.  
Cole v. Shallet.  
3 Lev. 41.  
S. P.

As where there was a negative covenant not to follow a trade, and in consideration of that the plaintiff promised to pay him 100*l*. *per ann*. during his life, this was held to be an independent covenant, and not to depend on the performance of the other: for the defendant never can be said to perform his covenant, for a negative covenant never can be said to be *performed*; so that the plaintiff would be without remedy for his 100*l*. *per ann*. if there were not mutual and independent remedies.

Doogl. 665.

2. "The second species of covenants considered with  
"reference to the time of performance are, such as are  
"conditions and *dependent*, in which the performance of  
"one depends on the prior performance of the other; and  
"therefore till the prior condition is performed, the other  
"party is not liable to an action of covenant.

"The

" The principal doubt under this head is, what constitutes a prior condition ; and these resolutions following have taken place : "

1. The plaintiff declared that he covenanted to transfer Blackwell v. to the defendant, on or before the 21<sup>st</sup> of September, so much Nash. flock, and that the defendant *consideratione præmissorum*, co- i Stra. 535. venanted to accept and pay for it ; and breach assigned that he was ready to transfer, and that the defendant then and there refused to accept or pay for it. On demurrer it was objected, that the transfer was a condition precedent, and that the plaintiff should therefore shew an actual transfer before he brought his action ; but it was held, that in *consideratione præmissorum* is in consideration of the covenant to transfer, not of the actual transfer : That it was therefore not a condition precedent, but that a tender was sufficient to support the action.

2. In executory-contracts, if the agreement be, that Thorpe v. one shall do an act, and for the doing thereof that the other Thorpe. shall pay, there the doing the act is a condition-precedent, and Salk. 171. the party who is to pay shall not be compelled to part with his money till the thing can be performed for which he is to pay.

But there are exceptions.

As if the day appointed for payment is before the time when the thing can be performed, an action may be brought for the money before the thing be done ; for then it appears that the party relied upon his remedy, and intended not to make performance a condition precedent : But *aliter* where the day is subsequent to the performance.

3. But where prior performance is necessary, that performance by one party immediately raises a duty on the part i Puter v. Carter. i Roll. Ab. 438. of the other, and he is bound to perform his part within convenient time, and without request.

4. " The dependence therefore or independence of co- Per Lord Mans- venants is always to be collected from the evident sense field. " and meaning of the parties, and however transposed the Dougl. 665. words may be, their precedency must depend on the order of time in which the intent of the parties requires " their performance."

As where the plaintiff declared that the defendant covenanted, " That at the end of a year and a half he would Kingston v. Preston. resign his business of a mercer in favour of the plaintiff and Pasch. 13 another, who should execute deeds of partnership for four- Geo. 3. B. R. teen years, and that immediately after the execution of such quot. Dougl. 664. deeds, he would permit the plaintiff and such other to carry on the

*the said business* in the defendant's house, and that he (the plaintiff) covenanted that at and before the sealing of the said deeds, that he *would procure good and sufficient security* to be given to the defendant to secure to him 250*l.* per month until the value of the stock should be reduced to 4000*l.*" and assigned a breach, that he was always ready to perform his part, but that the plaintiff had not resigned, and refused to surrender up the said business at the time fixed. The defendant pleaded that the plaintiff had not given nor tendered such sufficient security for payment of the 250*l.* On demurrer the defendant had judgment; for the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, when he delivered up to him his stock and business, and therefore the finding security was a *condition precedent*, and performance should have been averred.

Dougl. 665.

1 Lev. 293.

3d. "The third species of covenants, considered with regard to the time of performance, are such as are mutual conditions, and to be performed at the same time. In these, if one party is ready, and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers, has fulfilled his engagements, and may maintain this action for default of the other, though it is not certain that either is obliged to do the first act."

Jones & alt. v.  
Barkley.  
Dougl. 659.

As where the plaintiffs declared on an agreement by the defendant to pay 600*l.* *on the plaintiffs assigning an equity of redemption* of a certain quantity of stock to one Lane, and executing to him general releases of all demands of the plaintiffs against him, and then averred that they had *offered to assign to Lane the equity of redemption of such stock as aforesaid, and had tendered to him a draft of such assignment* and release, and then offered to execute the same, and would have then executed the same, but that the defendant *discharged* the plaintiffs from so doing, and that the defendant had not paid the 600*l.* or any part of it. It was adjudged that the word *on* makes it a covenant to be performed at the same time by each party, and that therefore where the plaintiffs offered, and were ready to perform their part, and the defendant refused to perform his, that the plaintiffs should maintain their action for the non-performance.

2. "But where the plaintiff relies on a tender and refusal, it should appear that *he could have performed his part* when the tender was made."

Clark v. Tyfon.  
1 Stra. 504.

For where the issue was on the tender of stock at a certain day, it was proved that though the books were not open for transfer



transfer of stock that day in common form, yet that by leave of a director (which was not usually denied) a transfer might be made, but that the defendant never attended. It was resolved, that the plaintiff had not performed his part so as to entitle him to the action, for perhaps leave might not have been obtained; and so he could not perform his part.

3. "Therefore if one party disables himself from performing his part by any act of his own, the other party is not obliged to offer to perform his part, but may have his action immediately."

As where the lessor covenanted with the lessee to make him a new lease on surrender of the old within twenty years, and before the twenty years expired, the lessor alienated the land to another by fine, it was adjudged that the action lay immediately; for that he had disabled himself to accept a surrender, and so to make him a new lease. Maynie v. Scott.  
Cro. Eliz. 450.  
Maine's Case.  
S. C.  
5 Co. 20. b.

2. I shall now consider in what manner a breach of covenant may be committed.

1. "If the covenant is a covenant in deed, this action will lie only for a *misfeasance*, but not for a *nonfeasance*. As if a man grants a way, covenant lies for stopping it up, but not for letting it out of repair." 1 Saund. 321.

"For covenants in deed must be broken by *some act* done."

As where in marriage-articles the husband covenanted, that the lands assured to the wife for her dower were of the yearly value of 1000*l.* and should so continue notwithstanding any act done or to be done by him, and the breach assigned was that the lands were not of the yearly value of 1000*l.* It was adjudged that the covenant would not lie, for there was no act causing a breach. Lord Rich v.  
Lady Rich.  
Cro. Eliz. 43.

So where a parson let his rectory for three years, and covenanted with the lessee that he should have and enjoy it for the term without any expulsion, or any act to be done by the lessor. The parson was afterwards deprived for not reading the articles, under stat. 13 Eliz. and his successor having ousted the lessee, he brought an action on the covenant, and it was held not to lie, for this was no act of the lessor, but merely a *nonfeasance*, and so not within the covenant. In like manner, as if a man covenants not to do waste, permissive waste is out of the covenant. 4 Leon. 48, 49.

2. "But

2. "But in the case of a covenant *in law*, action lies on it, though there has been *no act* to cause a breach."

Holder v.  
Taylor.  
Hob. 12.

As where the defendant was lessee by the word *demiss*, and covenant was brought by the lessee; because that the lessor was not seized but a stranger, and the action was held well to lie on the covenant in law, though the lessee *had never entered*, and no actual expulsion had taken place; for it would not be reasonable to force the lessee to enter and become by such entry a trespasser.

3. "Breach of covenant must always refer to that which is the *subject matter of the covenant or undertaking*."

Pettin v. Glover.  
Cro. Eliz. 420.  
Dobron v. Crew.  
Cro. Eliz. 705.  
S P.

As where there was a covenant in the lease of a manor for years, that if the lessee *disturbed*, or put out any of the copyholders paying their duties and services, that the lease should be forfeited, &c.; and breach assigned, that the lessee entered upon a copyholder in a cow-house, parcel of the premises, and *beat him*; and for that disturbance this action was brought. On demurrer it was adjudged, that the covenant only applied to disturbance *by ouster of the lands* of the copyholder, not to personal injuries, and so that the covenant was not broken.

Morgan v.  
Hunt.  
2 Vent. 213.

So where in covenant for quiet enjoyment by the defendant to the plaintiff, the breach assigned was, "That the defendant *had exhibited a bill in Chancery against him, for ploughing meadow, and obtained an injunction*, which had been dissolved with 20*l.* costs." On demurrer, this was held to be no breach of covenant; for it was quiet enjoyment; and this was a suit for *waste*.

4. "Breach of covenant must always be committed *in that which is granted by and passes under the deed containing the covenant*."

Lady Russell v.  
Gulwell.  
Cro. Eliz. 657.

For where the plaintiff demised to the defendant certain premises *excepting one close*, and breach was assigned, an entry into this close, the action was held not to lie; for though the exception was an agreement that the close should not pass, yet it was no agreement on the part of the lessee that *he should not occupy nor enter on it*, and therefore his entry was no breach: The only case in which an exception shall be an agreement to charge the lessee is, when he agrees to let the lessor have a thing *dehors* which he had not before, as a way over the land demised.

5. "To support this action, the *breach* must be committed *during the existence of the estate on which the covenant is placed*; for if the estate expires *at the time*  
"the

"the covenant is broken, this action it seems cannot be maintained."

As where the tenant for life leased for years: the lessee by indenture, bargained and sold all his estate, to have and to hold in as ample a manner as he held it: the tenant for life died before all the years were expired, and the bargainee brought his action against the bargainor for the eviction before the end of the term; and it was held not to lie: for this was no warranty; if it had, as by the death of the tenant for life the lease expired, the covenant founded on it determined with the estate.

Landydale v. Cheyna.  
Cro. Eliz. 157.  
Brudenell v. Roberts.  
2 Will. 143. S.P.

"But if the estate continues after the breach committed, the action will lie even after the estate expires."

As where the covenant was, that the lessee should enjoy the premises discharged of tithes, but that if the lessee was sued for them, and a recovery had, that he should retain so much out of the rent: After the term expired, the lessee was sued for two years tithes owing while he was in possession, and had a recovery against him. He was allowed to recover to that amount in covenant against the lessor.

Lanning v. Lovering.  
Cro. Eliz. 976.

## 2. OF COVENANT WITH REFERENCE TO THE PERSON.

These are, 1. Such as are joint and several. 2. Such as respect assignees. 3. Heirs and executors. 4. Baron and feme. 5. Tenants in common.

### 1. OF JOINT AND SEVERAL COVENANTS.

1. Where a covenant is made to many jointly, as "with and to them together, and *quolibet eorum*;" yet shall its construction be determined by the interest which it passes; that is, if each of the covenantees hath, or is to have, a *several interest or estate*, there, though the words be joint, each shall have a several interest under the words "*cum quolibet eorum*:" but where the interests are not several, these words shall not make the estate several which by the former words was created joint.

Slingby's case.  
5 Co. 19. b.

"And the action is to be brought therefore, jointly or severally, according to the interest which it passes."

Ibid.  
Matthewson's case, ante 246.

2. "So joint covenants shall be taken distributively for the benefit of the estate."

As where two made a lease and covenanted, "That the lessee should enjoy the land without let from them or any

Meriton's case.  
Noy. 86.

any other person," and *one alone*, disturbed the lessee; it was adjudged to be a breach of covenant, and that this action lay against the disturber, though the words of the covenant were not several.

3. "Where the covenant is a *covenant in law*, it shall be taken to be joint, if the interest is so, and the action must be brought against the covenantors jointly, for a breach at the time of the making of it: But for a subsequent breach it may be sued severally."

Coleman v.  
Sherwin.  
Salk. 137.

The plaintiff declared, on a demise by the defendant and one *J. S. virtute cuius* he entered and was possessed till ejected by the defendant, and that neither the defendant nor *J. S.* ought to have demised, for that one *R.* was seised in fee. It was resolved, That there being no express covenant, the action was founded on the covenant in law, on the word "*Demiserunt*;" and as the interest granted by the word was joint, so was the covenant, and the action should have been brought against both the lessors for that breach; and would not lie against the defendant alone. 2. But as to the breach by the *eviction*, it was well assigned; for it was the act of one only, and in construction of law each did demise; and it was a several contract as to their subsequent acts.

East Skidmore  
& alt. v. Vaud-  
revan.  
Cro. Eliz. 50.  
2 Roll. Abr. 220.

4. If a deed indented is made between two parties, and a third person is afterwards named in the deed, and comprised in the covenant, and such third person seals the deed, yet no action will lie for or against him on the indenture; and a release from him shall be void, for he is no party to the deed. But if the deed was a *deed-poll* as to *omnibus Christi fidelibus*, &c. there a covenant may be made to divers persons.

Lilly v. Hedges.  
1 Stra. 553.

5. Where a covenant is joint and several, an action may be brought against one, and breach assigned in the neglect of both (as in covenant by two, to receive the plaintiff's rents, and to account; and breach assigned the not accounting, *they nor either of them*); for perhaps one never sealed the deed, and one man often covenants for the act of another.

Litt. 315.  
Clayton v. Kin-  
aston.  
Case K. B. 222.

6. If several covenant jointly and severally, a *defence* to one is a *defence* to all: but the covenantee may covenant with one *not to sue him*, and yet sue the others; for though in such case a release to one would be a release to all (*Co. Litt.* 232.) and a covenant not to sue is to avoid circuity of action, construed a release, yet it is not so in its nature; and therefore where he has a remedy left against

against the rest, it shall be construed a covenant, and no more.

But two deeds made at the same time, between the same s. c. parties, that have not a reference one to the other, shall not be construed a defeasance one of the other.

And Note, That in the case of leases for years, the defeasance may be after the first deed. But it is otherwise in the case of freeholds of corporeal inheritances.

## 2. OF COVENANTS WHICH RESPECT ASSIGNEES.

1st, These are either *against* assignees; or, 2dly, By them.

### 1. OF COVENANT AGAINST ASSIGNEES.

1. When the covenant relates to and is to operate on a *Spencer's case.* thing in being, parcel of the demise, the thing to be done by s Co. 16. force of the covenant is *quodammodo* annexed to the thing demised, and shall go with the land, and bind the assignee to the performance, though not named. As if the covenant is to repair an house then demised, this shall bind the assignee, though not named. But it is otherwise where the covenant relates to a thing *not in being* at the time of the demise. As if it be to build a wall on the land demised, this not being in *esse* when the covenant was made, it shall not extend to the assignee, if not named.

2. But if the covenant mentions the assignee; as if the *Spencer's case.* lessee covenants for him and his assigns, there the assignee shall be bound, by any covenant, *Ibid.* for any thing to be done on the thing demised; as here to build a wall on the lands demised: but to do any thing which is merely collateral to the thing demised, as to build an house on some other part of the lessor's land, there the assignee shall not be bound, though he is named.

3. "Wherever a covenant is for the benefit of the estate demised, this shall extend to the assignee, though not named."

As in this case, where the lessee covenanted for himself, his executors and administrators, "to leave fifteen acres every year, untilld," and afterward assigned his estate to the defendant; and the breach assigned was, "That the defendant had not left the fifteen acres untilld, but on such a day had ploughed part," &c. exception being taken that the assignee not being named was not liable; it was  
U  
adjudged,

*Cookson v. Cook*  
Cro. Jac. 125.

adjudged, That the covenant *being for the benefit of the estate*, that he was liable.

4. "So a covenant which extends to *the support* of the thing demised, shall bind the assignee, though not named."

Dean & Chapter  
of Windsor's  
case  
5 Co. 24.

As a covenant to *repair the houses, &c. demised*, for such is for the support of the things demised, or, according to *Spencer's case*, ante, 289. extends to it as being in *esse* at the time of the demise, and therefore shall bind the assignee.

Grescot v.  
Green.  
Salk. 199.

5. "Though the assignee be named in the original covenant; yet if it has been broken before assignment, no action will lie against him."

Churchwardens  
of St. Saviour's,  
Southwark, v.  
Smith.  
1 Black. Rep.  
351.  
3 Burr. 1271.

As where the lessee covenanted to pull down certain old houses, and rebuild others within seven years, the lessee did not perform his covenant, and at the end of seven years assigned to the defendant, against whom the action was brought, and held not to lie, *the breach being complete before the assignment*.

6. "To intitle the lessor to maintain an action of covenant against a lessee, as assignee, he must be assignee of *the whole term*."

Holford v.  
Hatch.  
Doug. 274.

For where the original lessee made an under-lease, for a time, somewhat less than the term of his lease, and the lessor brought covenant against the under-lessee; it was adjudged not to lie, he not being assignee: and the plaintiff having declared against him in that capacity, was nonsuited. (*Vid. ante* 201.)

Tilney v. Norris.  
Carth. 319.  
Spencer's case.  
5 Co. 17. b.

7. If there is a covenant which runs with the land, as to repair *ex. gr.* and the lessee assigns over, and the assignee dies intestate, the lessor may have covenant against the administrator of the assignee, and declare against him as assignee. For such covenants bind those who come in by act of law, as well as by act of the parties.

Derisley v.  
Custance.  
4 Term Rep. 75.

So where the plaintiff declared on a covenant in his lease for quiet enjoyment, the lease being made by the defendant's ancestor, and that the reversion came to and vested in the defendant by assignment thereof; in evidence it was proved, That the land descended to the defendant, as heir to the first lessor; this proof was held to maintain the issue.

Doug 736.

8. "With regard to *how far* the lessee or assignee are chargeable in covenant, there is a considerable difference. 1. The lessee has, from his covenant, both a  
"privity

"privity of contract and of estate; and though he assigns, and thereby destroys the privity of estate; yet the privity of contract continues, and he is liable in covenant, notwithstanding the assignment. But, 2dly, the assignee comes in only in privity of estate, and he therefore is liable only while in possession." Douglas, 441.

"As to the first, therefore, lessee is liable for a breach committed by the assignee after the assignment."

In this case it was resolved, that if the lessee assigns, though the lessor accepts rent from the assignee, yet for the breach of any express covenant, though committed by the assignee after the assignment, this action will lie against the first lessee on the ground of the privity of contract still continuing. But an action of debt will not. Bernard v. Godscall.  
Cro. Jac. 309.  
Norton v. Ackland.  
Cro. Car. 418.  
S. P.

So where the lessee became a bankrupt, and so all his effects assigned, and the assignees sold the term of which he was lessee, he was nevertheless held to be liable on his express covenant for rent arrear, after the sale and assignment by the assignees. Auriol v. Mills.  
4 Term Rep. 94.

But as to the second, that the assignee is liable only while in possession, it was resolved, That if the lessor brings covenant against an assignee of his lessee, the assignee may plead, "That before action brought, or cause of action accrued, that he had assigned over:" for the assignee is only chargeable in covenant for a breach committed while in possession, not for a breach after assignment: as was in this case, the non-payment of rent. Pitcher v. Tovey.  
Salk. 81.  
Show. 340.  
S. C.  
Chancellor v. Poole.  
Dong. 735.

And it is no objection that the assignee may assign to a beggar; for it was the lessor's folly to accept of the original assignee. But he is not without remedy, since the lessee is still liable in covenant, or he may distrain on the land.

And though the assignment was to a *feme covert* before the cause of action accrued, yet it is good to discharge the assignee. For a *feme covert* is of capacity to purchase, though her husband may disagree to it. Barnfather v. Moffat.  
Doug. 435.

"But it is to be observed, that this distinction now mentioned between the lessee and assignee applies only to the case of express covenants in deed: For it differs in the case of covenants, which are collateral."

Batchelor v.  
Gage.  
Sir W. Jones,  
223.  
Cro. Car. 188.  
S. C.

For if the lessee assigns; for the breach of any *express covenant*, this action will lie *against the lessee or his executor*, or against the assignee, for a breach committed by the assignee after assignment, and *after the lessor had accepted rent from the assignee*; but it will lie for a breach of a covenant in law, or which is collateral, *against the lessee only*.

10. "Covenant will lie against an assignee of *part* of the thing demised."

Konan v. Kemisc.  
Sir W. Jones,  
245.  
Longham v. King.  
Cro. Car. 220.  
S. C.

As where the plaintiff demised two houses with covenant on the part of the lessee for himself and assigns to repair; he assigned *one of them*, and for not repairing, the lessor brought covenant against the assignee, and the action was held well to lie.

11. "How far *actual possession* is necessary to enable the lessor to maintain this action against an assignee, it has been decided."

Walker v. Reeves.  
Mich. 22 G. 3.  
B. R. quot.  
Doug. 444

That by the assignment the title and *possessory right* passes, and the assignee becomes possessed in law. That as therefore an assignee is only liable while in actual possession, that if he assigns over before a breach, though his assignee has not taken actual possession, yet that he (the first assignee) is not liable to an action of covenant. As here, where the defendant was the assignee of the original lessee, and covenant being brought against him for rent reserved on the lease, he pleaded, "That, before the rent became due, he had assigned all his interest in the premises to one *Rigg*, who, by virtue of such assignment, entered, and was possessed. The plaintiff replied, that at the time when the rent became due, the defendant *remained and continued in possession, absq. hoc*, that *Rigg* had entered, &c.: and on demurrer it was held, That the assignment being admitted, the actual possession was not sufficient to charge the first assignee, the possession in law being in the second assignee by virtue of the assignment.

Eaton v. Jacques.  
Doug. 438.

But where the defendant was a *mortgagee*, and the mortgage was made in the form of an assignment of all the lessee's term (which should regularly have been by an under-lease) it was adjudged, that the mortgagee could not be sued as assignee, he having never taken actual possession, and even though the mortgage had been forfeit: for the mortgage is only conditional, a security for money, *not an actual transfer of property*.

Spencer's case.  
5 Co. 17.  
3 Ref.

12. If a man leases *sheep*, or any thing personal, and the lessee covenants for himself and *his assigns* at the end



the time to deliver up the sheep or things so let, or such a price for them: if lessee assigns, this covenant shall not bind the assignee; for it is but a personal contract, and wants such privity as is between the lessor and the lessee and his assigns, by reason of the reversion.

But it was resolved in this case, That a lease could be made of *tithes* with covenants which would extend to and bind the assignee: the covenant was, "That the lessee, his executors, administrators or assigns, would not let any of the farmers of the parish of *Monkstown* have any part of their tithes," upon which an action was adjudged to lie against the assignee.

## 2. OF COVENANT BY THE ASSIGNEE.

1. Covenants in law, which run with the land, shall extend to the assignee, who may maintain this action on them. As upon the words "demise and grant," the assignee shall have a writ of covenant if ejected; for as the lessee or assignee have the annual profits in return for rent, therefore for the loss of these he is entitled to a compensation from the lessor. Nokes's case, 4 Co. 80.  
Spencer's case, 5 Co. 17.  
4 Ref.

2. "Assignees who come in by act of law shall have the benefit of these covenants, and maintain this action."

As tenant staple by statute merchant, or elegit, or he who purchases a lease for years sold under an execution; all these are assignees. So is tenant by the courtesy; so the husband of some lessee for years who survives: all of whom may maintain this action as assignees. 5 Co. 17. a.

3. "At common law no grantee or assignee of a reversion could take the benefit or advantage of a condition for re-entry. It was therefore enacted by statute 32 H. 8. c. 34, That all persons grantees of the reversion of any lands from the king, or grantees or assignees of any common person, the heirs, executors, successors, or assigns, shall have like advantage against the lessees by entry for non-payment of rent, or for waste, or other forfeiture, as the said lessors or grantors themselves had." Co. Litt. 215. a.  
Litt. f. 347.

On this statute it is to be observed,

1. That as the words of the statute are against lessees, it shall not extend to gifts in tail. Co. Litt. 215. a.

2. That the assignee of part of the estate in reversion, or of a grant for years of part of the reversion in fee, may take advantage of the condition.

3. But

Co. Litt. 215. 3. But the assignee of *part of the reversion* shall not take advantage of the condition; as if there be lessee of three acres, and the reversion is granted of two of them, the grantee shall not have advantage of the condition, for it is entire, and cannot be apportioned.

Ibid. 4. Whoever comes in by act of the party, as by bargain and sale of the reversion, is an assignee within the act; but it is otherwise when one comes in by act of law, as the lord *by escheat*, or to one who is in of another estate.

Ibid. 5. The grantee shall not take advantage of a condition before he has given notice to the lessee, but he may of a covenant.

Ibid. 6. The grantee or assignee shall only take advantage of such conditions as are for the benefit of the reversion, like those put, as for waste, non-payment of rent, &c.; but not for paying a sum in gross, as delivery of corn, or such like.

2 Show. 134. 7. The assignee of the lessor may maintain covenant against the lessee after the lessee had assigned, and he had accepted of rent from the assignee; for such is within the statute.

Sir James Brett v. Cumberland. Cro. Jac. 521. So also the assignee of the reversion, who hath accepted rent from the assignee of the lessee, shall nevertheless have covenant against the executor of the lessee; and for a breach of covenant done after the assignment; for it is a covenant in fact, and runs with the land, and the lessee by his own act shall not discharge himself.

Glover v. Black. Salk. 185. 8. It was formerly (*Yelv. 222. Hob. 178.*) an opinion, that the surrenderee of a copyhold was not an assignee within the statute: but modern cases are otherwise. That the surrenderee of a copyhold reversion may bring debt or covenant against the lessee within the equity of stat. 32 H. 8. for it is a remedial law, and no prejudice can come to the lord.

Barker v. Beardswell. Show. 4. 4. Though by the custom of *London* an apprentice may be assigned, yet the assignee cannot have covenant on the indenture of apprenticeship: for there cannot be an assignee by custom, and he is no party to the contract.

### 3. OF COVENANT BY OR AGAINST THE HEIR OR EXECUTOR.

F. N. B. 343. 1. "Covenants real, or such as are annexed to the estate, shall descend, and the action be brought either by or against

"against the heir or executor, according to the estate and time of the breach."

And where the covenant was to use the land in an husband-like manner, and to deliver it in like condition, and the action was by the executor of the landlord against the tenant; it was ruled by *Justice Buller*, That this was a covenant which ran with the land, and that so the executor might sue on it. Watson v. Walfsh.  
Taunton Lent Ass. 1785. MSS.

"As to the estate, the heir shall have the action by reason of the reversion and injury to it."

As where the lessee for years covenanted to repair and leave in repair, it was held, That the heir should have an action of covenant on this, though not named; for it was a covenant which run with the estate, and so should go with the reversion to the heir. Lougher v. Williams.  
2 Lev. 92.  
Skinn. 305.  
S. C.

So where the plaintiff declared on a covenant to repair, as heir to his ancestor, who died the 10 W. 3. and the breach was laid on the 3 Ann, and for ten years before, which included the time the ancestor was living; and objection being taken for thus including the time of the ancestor, it was over-ruled by *Holt*, who held, That if the premises were out of repair in the ancestor's time, and continued so to the time of the heir, that it was a damage to the heir, and that he should recover not with reference to the length of time that the premises were out of repair, but as much as should be sufficient to put them into repair. Vivian v. Campion.  
Salk. 141.

2. As to the time of the breach, the action is given to the executor, as in this case:

The plaintiff as executor declared, that the defendant had sold to the plaintiff's testator certain lands, and covenanted with him, his heirs and assigns, that he should enjoy against him and Sir *Philip Vanlore*, and all claiming under them, and assigned a breach that one claiming under Sir *P. Vanlore* had ejected his testator: it was objected, that the action should have been brought by the heir or assignee: but it was held, That the eviction being in the life-time of the testator, he could not then have heir or assignee, and so the action belonged to the executor. *But quære*, if the reason might not also be, That as the purchase was out of the personal estate of the testator, and the damages recovered would belong to it, that therefore the executor should bring the action? Lucy v. Livingston.  
2 Lev. 25.

2. The action of covenant lies against the heir or executor also, according to their estates.

#### 1. Executors

Hob. 188. *infra*. 1. Executors or administrators who come to any term of lands or tenements, as such, are bound by the covenants which run with the estate, as belonging to the personal property of the testator or intestate.

Chapman v. Dalton  
Plowd. Com. 286. As if the lessor covenants with the lessee to make him a new lease at the end of his term, and the lessee dies, his executor may have covenant on this, though not named.

Per Lee, Chief Justice in *Lydell v. Metcalf*.  
1 Will. 4. "Where lands come to an executor or administrator, they may be charged for a breach in their own time, as non-payment of rent, or with an action of covenant, either in that right or as assignees; but there is this difference:"

Tilney v. Norris.  
Salk. 309. That if the plaintiff declares against them as assignees, they are charged as tenants; and the judgment is *de bonis propriis*.

Buckley v. Pirk.  
Salk. 317.  
Collins v. Thoroughgood.  
Hob. 188. But if the action is brought against them, as executors or administrators, the judgment shall be *de bonis testatoris*, even where the breach has been committed in their own time; as for repairs, *ex. gr.*: for it is the testator's covenant which binds the executor, as representing him, and he therefore must be sued by that name.

2<sup>d</sup> "But covenants merely personal, descend exclusively to the executor or administrator, and covenant lies only against them."

Bro. title Cov. 12. As if *A.* covenants that *B.* shall serve *D.* as an apprentice for seven years, and dies, and *B.* departs within the time, covenant will lie against the executor of *A.* though not named.

#### 4. OF COVENANT BY HUSBAND AND WIFE.

By statute 32 H. 8. c. 28. it is enacted, "That in leases for life, or for years, of the wife's land, the wife shall be a party to the lease, and the reservation be to her and her heirs; and therefore in covenant on such leases the wife should join."

Beaver v. Laine.  
2 Mod. 217. But where the covenant is to baron and *feme*, the husband alone may bring the action.

Alcberry v. Walby.  
1 Stra. 287. And where the lease was of land, of which the wife was tenant in common with another, and the husband and wife brought the action, it was held, That the wife might or might not join in the action.

## 5. OF COVENANTS BY TENANTS IN COMMON.

In actions personal, tenants in common shall join: they therefore should join in an action of covenant.

Tenants in common of a *reversion*, on a lease for years, shall join in covenant for not repairing; for it is in the personality merely.

Kitchen v. Buckley.  
1 Lev. 109.  
Sir. T. Raym.  
70. S. C.

I shall now proceed to consider the cases under the head of Pleadings in this action, premising the following cases as to the persons who should bring the action.

1. "Where the action is founded on an *indenture*, the person bringing the action must be a party to the deed, or he cannot maintain the action."

1 Roll. AB. 517.

As where in covenant the plaintiff declared, that *A.* being arrested at his suit, the defendant, in consideration that he would order the bailiff to let *A.* go at large, covenanted with the plaintiff to bring in the body of *A.* and deliver him to the bailiff on such a day; and on *oyer* the deed appeared in *hæc verba*: "*I* (the defendant) do promise and engage myself to bring in the body of *A.* and deliver him to *B.* (the bailiff) on such a day." On demurrer, it was held that the plaintiff should not have this action, he being no party to the deed; for though covenant may be brought on a deed-poll, in which no person certain is mentioned, but generally, "To all whom it may concern;" yet a person must be named in a deed indented, or he cannot have an action on it.

Green v. Horne.  
Salk. 197.

But where a deed began "It is agreed that," &c., and the parties names are not mentioned in the body of the deed, but at the end was, "in witness whereof we have hereunto set our hands and seals," and both parties signed and sealed it, it was held that it was a sufficient naming in the deed, and that an action of covenant lay on it.

Nurse v. Frampton.  
Salk. 214.

2. "Wherever a covenant is for the benefit of any person, he must take notice and advantage of it at his own peril."

As where there was a covenant by the defendant (lessor) "to permit the plaintiff (lessor) to sow clover among the defendant's barley;" and the plaintiff assigned a breach, that the defendant had sowed the barley *without giving him notice*. The defendant pleaded, that he *had not prevented the plaintiff*; on demurrer, the plea was held sufficient, for the defendant was only bound by his covenant to permit, and the notice

Hughes v. Richman.  
Cowp. 125.

notice should have been taken by the plaintiff, for whose benefit the covenant was.

### III. OF THE PLEADINGS.

#### I. PLEADINGS ON THE PART OF THE PLAINTIFF.

1. "The declaration in this action should set out expressly, that the covenant was made *by deed*."

Moore v. Jones.  
2 Stra. 814.  
Cro. Eliz. 517.  
S. P.

For where the plaintiff declared in covenant, "That the defendant *per scriptum suum factum apud* Westminster, granted to the plaintiff," &c.: this was held to be error, for there were no words which imported it to be a deed, without which the action could not be maintained.

Thoresby v.  
Sparrow.  
1 Will. 16.  
2 Stra. 1186.  
S. C.

It was formerly held, That where the plaintiff so declared on a deed, he should always *make a profert* of it, and that the court could not dispense with it; for the defendant had a right to it by law, and this was the case, though the deed appeared to be lost, or to be in the defendant's possession.

Read v.  
Brookman.  
3 Term. Rep.  
51.

But now the plaintiff may declare, that the deed has been lost by time and accident, and the *oyer* shall be dispensed with.

Dundas v. Lord.  
Weymouth.  
Cowp. 665.

"But in declaring, the plaintiff *should not set out the whole deed at length, or superfluous parts.*"

Price v.  
Fletcher.  
Cowp. 727.  
S. P.

As in covenant on a lease, it is sufficient to say, "That the defendant had, by indenture, demised certain premises to the plaintiff (without naming them) subject, among other things, to such a proviso," and then state the covenant and breach. This was by the order of court.

2. "Where the covenant is general, a general assignment of a breach is sufficient."

Farrow v. Chcvallier.  
1 Salk. 139.

As where the covenant was, not to buy or sell for two years, without leave of the plaintiff; and the breach assigned was, "That the defendant *diversis diebus et vicibus* between such a day and such a day, had sold to A. and several other persons unknown, goods to the amount of 100l. After a verdict, it was moved in arrest of judgment, That the breach was uncertain as to times and persons; but it was held to be sufficient as a general assignment; for it was so described, that a recovery in this might be well pleaded in bar to another action for the same cause.

"But the most general assignment is *in the words of the covenant itself.*" As,

If the lessor covenants that he is seised in fee, or hath full power to lease. In declaring in covenant, it is sufficient for the plaintiff to say, "That lessor *was not seised in fee, or had not full power to lease.*"

Mulcot v. Ballett.  
Cro. Jac. 369.  
9 Co. 60.

And then the defendant must shew that he had full power to lease, or was seised in fee, *by shewing* what estate he had at the time of making the lease, which then puts the plaintiff upon shewing a special title in somebody else.

Hancock v. Field.  
Cro. Jac. 170.  
S. P.

"But where the covenant is broken *by some act* of a third person, it is not sufficient to state the breach generally, *for that act* should be set out; but it should seem that it might be sufficient to state that breach in the replication."

As where the covenant was to save harmless from all suits and lawful evictions, the defendant pleaded performance. The plaintiff replied, that one J. S. took out an *hab. fac. possession. debito modo exeunt, &c.* and by virtue thereof expelled him. The defendant demurred, and had judgment; for *debito modo* is not sufficient, without shewing particulars. The *hab. fac. possess.* always recites the term of the judgment, and that it at least should be set out.

Nicholas v. Pullen.  
1 Lev. 83.  
1 Keb. 379, 413.

3. "Where the plaintiff assigns a breach, it should be so set out, that it may appear clearly to be within the covenant."

As where the defendant covenanted in a lease, that he would not cut down *more timber than was necessary for the repairs* of buildings. The plaintiff (lessor) assigned a breach, that the defendant had cut down trees *to the value of 10l.* and converted them to his own use; and after a verdict, the judgment was reversed for error: For there should have been an averment, "That he had cut down more than was necessary for repairs;" for as there assigned, it was not within the covenant.

Wingfield v. Sherwood.  
Stile 5.

"For such assignment of the breach was not within the words of the covenant, and so was bad for the uncertainty; for where the covenant *may not have been broken*, the declaration assigning the breach in that manner is ill."

As where the covenant was by the defendant that he, his executors, administrators, or assigns, would repair a mill, and breach assigned the not repairing it by the defendant, his executors, administrators, and assigns. On demurrer the declaration was held to be bad; for the breach

Colt v. Howe.  
Cro. Eliz. 348.

breach should be in the disjunctive, "or his assigns:" for if any of them did repair, the action would not lie.

4. "Where there is a *proviso* in the deed, defeating the covenant, the plaintiff need not set it out in his declaration, "but leave the defendant to plead it."

*Elliott v. Blake.*  
Sir T. Raym.  
65.

As on a covenant to deliver so much saltpetre before the 20th of *October*; and there was a proviso, that if defendant *was prevented by the sea*, that the deed should be void. It was held, that the plaintiff need not state the proviso, as it would be matter of defence for the defendant, of which he might avail himself.

"But where there is an *exception* making part of the covenant, the plaintiff, in setting out the breach, should also shew that the breach was not within the exception: for the declaration is on *the whole covenant*, and the breach will not be within it, unless so set out."

Sir T. Jones,  
125.

As where the plaintiff declared on a covenant by the defendant, to repair all the pales of a garden then demised, except those to the east side, and assigned the breach, in not repairing *sec. formam conventionis*. This was held well after a verdict; but it was agreed, That it would have been had on special demurrer, for want of setting out "that the pales were not those excepted."

\* And *Note*, "That if the plaintiff declares on a covenant "which he sets out, and afterwards assigns an inconsistent "breach, it under a *sciz.* it shall be rejected."

*Hayman v.*  
*Rogers.*  
1 Sira. 232.

As where the plaintiff declared upon articles, dated the 30th of *December*, 1718, not to set up the trade of a baker, from the date of those articles for so many years, and afterwards assigned a breach, "That defendant did *afterwards*, *to wit*, 1st of *May*, 1718, follow a trade." This being inconsistent with the articles, was rejected.

5. "Where a covenant is in the alternative; that is, "where the covenantor undertakes for one of two things, "breach should be assigned as to both."

*Sherwood v.*  
*Noon.*  
1 Leon. 250.

As where the defendant covenanted that he would not take wood without the assent or assignment of the lessor or assigns: it was held not sufficient to say that defendant took wood *without the assignment* of lessor, or his assigns; for it might be with *their assent*, and so no breach.

*Aleberry v.*  
*Walby.*  
1 Sira. 229.

But where the covenant was "to pay or cause to be paid," that the defendant had not paid, was held to assign the breach sufficiently, without saying "or caused to be paid;"



paid;" for if the defendant had caused to be paid, he had paid.

" But where the covenant is founded on the contingency of two things, and *that which shall first happen*; the plaintiff may declare, on a breach arising from the happening of one of them, without making any mention of the other."

As where the plaintiff declared on a covenant, whereby it was agreed, that he should deliver to the defendant a mare, and the defendant was to pay for the same twenty guineas, at the death of his mother, or day of marriage, whichever should first happen. It was adjudged, That it was sufficient, in declaring on the covenant, to state the happening of one of the contingencies, without saying that it was the first: and that if even the other had happened first, the declaration was still good; for the delay was the plaintiff's own. Leggin v. Lord Orrery. 1 Lord Raym. 132.

6. " Where the action is for breach of covenant by the act of a third person, the declaration should set out, that the breach was by such a person, *under a claim of title, or by lawful act*: for the covenant on the part of covenantor does not extend to the illegal acts of others, who are themselves liable to an action."

As where the lessor covenanted that the lessee should hold the lands discharged of payment of tithes, and the breach assigned was, a recovery of them in an action by the parson. It was held on demurrer, That the breach was ill assigned, because he had not alledged *that the suit was lawful, or the tithes due*: for the covenant did not extend to illegal suits. Lanning v. Lovering. Cro. Eliz. 917.

" The questions under this head are those which for the most part arise under the express covenant for quiet enjoyment, or the covenant in law under the demise, and an expulsion by a third person."

" The declaration therefore should always state the disturbance or eviction to be by a person *by claim of title*, and not of title only, but of good and *elder title*; for perhaps the eviction might be by a person claiming *under the lessee himself*."

Therefore, where the plaintiff declared on a demise of a house in London, and covenant that the lessee should enjoy without eviction from the lessor, or any claiming under him, and breach assigned, " That one Savery had recovered the house in ejectment by verdict, and expelled the plaintiff: Nokes's case. 4 Co. 80. b.

plaintiff: On demurrer, it was adjudged, That although the recovery was by verdict, yet that the plaintiff ought to have shewn that *Savery had elder title*: for otherwise the covenant in law was not broken.

2 Lev. 37.

" But it is sufficient in such a case, to assign the breach by act of a person claiming by elder title, *without stating what that title is*; for perhaps the plaintiff may not know the title of the person expelling him: or state that he evicted him by legal process."

Foster v. Pearson.  
4 Term. Rep.  
617.

And therefore, if it appears from the declaration itself that the claim was by elder title, and not under the plaintiff himself, it is good, without setting it out as *elder title*.

Proctor v. Newton.  
2 Lev. 37.

As where the defendant declared on a demise to him for a year, and the breach assigned was, that *J. S. who had title by virtue of a demise made to him of the same land, before that made to the plaintiff*, had entered and evicted him; it was held to be well, on motion in arrest of judgment; for the title appeared sufficiently to be an elder one, and not under the plaintiff.

Force v. Vines.  
1 Roll. Rep. 21.  
Ratcliff's case.  
1 Brownl. 80.  
S. P.

" And so where the breach is by a *person included in the covenant*, it is not necessary to state any title as to him, for the action is founded on the covenant itself."

\* As where the lessor covenanted, " That during the term, neither *he, his heirs or executors*, should interrupt the lessee;" and the breach assigned was by entry of *the executors* of the lessor, it was held, That no title need be set out as in them, they being included in the covenant on the part of the lessor.

Smith v. Sharp.  
1 Salk. 139.

7. How far the breach should be assigned, as affecting assignees, the distinction is settled in this case, *viz.* That where a thing is to be done by a man or his assigns, the breach must be in the disjunctive, that it was not done by him or his assigns: But where the act is to be done to a man or his assigns, it is sufficient to assign the breach, that it was not done to him, without mention of his assigns.

" But it should seem that the rule here laid down, is only the case where the action is not against the first covenantor or lessee."

Gyle v. Ellis.  
1 Stra. 228.

For where the covenant was on a lease to the defendant, by which he covenanted, he, his heirs and assigns, every year, to plant eight crab-stocks; and breach assigned that *he had not planted such a year*; it was held to be well, without

without mentioning *his assigns*: for the action being against the first lessee, an assignment was not to be presumed.

So where the defendant covenanted for himself, his heirs and assigns, to pay rent, &c.: and the breach assigned was, that he had not paid without saying "or his assigns," the court held the breach well assigned; for they would not presume an assignment.

Mayor of London v. Sir Fisher Tench.  
Mich. 1733.  
B. R.  
Bulker N. P.  
164.  
Lovell v. Sorrell.  
Mod. Caf. 79.

In declaring against an assignee, the plaintiff may declare against him generally as assignee, *without setting out the mesne assignments*, for perhaps he may not know them.

8. "If the plaintiff, in declaring in covenant, should state "the estate under which he derives his right to the action, "and he *mis-states* it, it is his error."

The plaintiff, in stating his title in this case, set forth, That one *Strobridge*, who was seised in fee, made the lease in question, and that on his death the estates in reversion descended to the wife of the plaintiff, as his heir at law, whereupon he (the plaintiff) became *seised of the reversion, as of freehold, in right of his said wife*. On demurrer, the declaration was held to be ill; for from his own shewing, the estate he had was *in him and his wife*, in right as of fee, and not as stated.

Polyblank v. Hawkins.  
Doug. 314.

But it was agreed in this case, that the plaintiff *need set out no title, but declare generally "quod dimisset"*: and it was there settled, That where he had set out the title *imperfectly* (as in not regularly setting out a descent, by omitting the person under whom plaintiff claimed) that this was surplusage, and could be rejected. But, if the title had been stated *wrong*, as in the last case, it had been error.

Aleberry v. Walby.  
1 Stra. 229.  
2 Ref.

9. "In covenant, to pay a sum certain, there can be no apportionment of demand, for the breach must follow the "covenant, which is entire."

Therefore, where the plaintiff declared, on a charter-party, whereby the defendant covenanted to pay the plaintiff so much, *viz.* 3l. *per ton* for goods imported, and assigned a breach in not paying for so many tons, and *one hoghead*: On demurrer, the breach was held to be ill assigned in charging for the hoghead, the covenant being only so much *per ton*. But *aliter*, had it been to pay so much *per ton secundum ratam*.

Rea v. Burnett.  
2 Lev. 124.

So where the covenant was, that the defendant was to take the plaintiff for his clerk, and allow him *2s. per quire* for what he should copy; and breach assigned the non-payment for four quires and *three sheets*; judgment

WAS

was in this case reversed; for there could be no apportionment for the three sheets.

Inclendon v.  
Cripps.  
Salk. 658.

But where the plaintiff so claims more than the contract will support, he may enter a *remittitur* for what he has claimed too much, and take judgment for the rest, where the demand is not settled to a certain amount by the deed, but depends on something extrinsic; for if the demand is so settled, as if it be a covenant to pay 20l. there can be no *remittitur*.

Vernon v. Jefferys.  
2 Stra. 1146.

10. Where there is a joint covenant by several, all should join in the action, or on demurrer on *oyer* it will be bad.

S. C.  
Bul. N. P. 158.

But if any named in the indenture have not sealed it, they should be excluded by an averment to that effect. But advantage must be taken by pleading in abatement, if the action is brought *against* part only of the covenantors.

Barker v.  
Damer.  
1 Salk. 80.  
1 Show. 191.  
S. C.

11. *Covenant for non-payment of rent* must be brought where the lands lie, though the rent be made payable in another place. As here where the lands lay in *Ireland*, and the rent was reserved to be paid in *London*, it was adjudged, That the action should be brought in *Ireland*.

But debt for rent, where it may be brought, *Vid. ante*, 212.

12. "Where the plaintiff cannot sue on a breach of covenant, without some previous circumstances to be performed, the declaration should aver the performance of them."

Crookhay v.  
Woodward.  
Hob. 217.

As where the defendant covenanted to satisfy the plaintiff for all sums of money which the defendant's son should embezzle while apprentice to the plaintiff, *within three months after proof and request made*, the declaration laid only the embezzlement and request, but not the time or proof. The plaintiff had a verdict; but judgment was arrested for this fault.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

These are, 1st. Performance. 2. Other covenants in bar. 3. Nil habuit in tenementis. 4. Non est factum. 5. Entry and eviction. 6. A release. 7. Accord and satisfaction. 8. A tender and refusal. 9. Levied by distress. 10. Infancy. 11. Bankruptcy.

## 1. Of the Plea of Performance.

As to which plea, 1. "If all the covenants in an indenture are in the affirmative, the defendant may plead *performance generally*: but if any are in the negative, he must plead to them specially (for a negative cannot be performed) and to the rest generally." Co. Litt. 303. b.

And if he pleads otherwise, on demurrer, the defendant shall have judgment. Crofwell v. Peachy. Cro. Eliz. 691.

Therefore where the defendant covenanted by charter-party, that he would sail from the *Thames* to such a place in *Spain*, and the words were, "That he *decederet procederet, et non deviet*," he pleaded performance generally, and it was held ill; for there was an express negative covenant "that he should not deviate," to which he should have pleaded specially; for though he sailed from the *Thames* to *Spain*, he might have deviated. Laughwell v. Palmer. 1 Sid. 87.

And the case is the same in debt on a bond for performance of covenants. Performance is a bad plea; for some of the covenants might be negative. Ellen v. Bote. Alleyn 72.

2. "So if any of the covenants is in the *disjunctive*, he must shew which he has performed." Co. Litt. 303. b.

"So where the covenant is for the act of a stranger, performance generally is a bad plea, it should shew how performed." Show. 1.

## 2. Of the Plea of other Covenants in Bar.

1. "A covenant in one indenture shall not be pleaded in bar to a covenant in another indenture, except such be a defeasance of the former; for perhaps the injuries may not be equal."

As where the plaintiff declared, That the defendant, by indenture, covenanted to pay to the plaintiff 300l. *per ann.* so long as his wife should live with and be supported by the plaintiff, and the action was for one quarter's salary. The defendant pleaded, That afterward, there was another indenture made between the same parties, that whenever the said defendant and his wife should come and cohabit together, that the allowance should cease; and pleaded further, that they did cohabit. On demurrer, it was ruled to be a bad plea, and that the defendant should have an action on his indenture, but could not plead it in bar of a covenant in the other. Gawden v. Draper. 2 Vent. 217.

X.

But

Clayton v. Kynaston and Lacy v. Kynaston.  
1 Salk. 573.  
and 575.

But a defeasance by another deed may be so pleaded in bar; but the second deed must appear to be *intended to operate as a defeasance*, and contain proper words for that purpose, "as reciting the first deed, and declaring it to be thereby void."

"2. But one covenant in a deed may be pleaded in bar to a covenant in the same deed; for the sense of the parties is to be collected from the whole of the deed."

Johnson v. Carro.  
1 Lev. 152.

As in covenant for rent, the defendant was allowed to plead another covenant in the same indenture, that he (as lessee) might retain so much of the rent for repairs and charges.

### 3. Of the Plea of Nil habuit in Tenementis.

Heath v. Vermieden.  
3 Lev. 146.

"In this action the defendant cannot plead *nil habuit tenementis*; for the indenture is an estoppel.

"So neither shall the defendant plead a plea which amounts to *nil habuit in tenementis*, though not so in terms."

Palmer v. Elkin.  
2 Stra. 817.

As where the plaintiff declared, as assignee of the reversion from one Palmer who had by deed demised the premises in question to the defendant for twelve years then unexpired; the defendant pleaded, That ten years before the making of the lease to him, that Palmer had sold the reversion in fee to one Bragg, and traverses the seisin of Palmer, as alledged by the plaintiff. To this plea there was a general demurrer, and the court resolved, 1. That the defendant's plea was tantamount to *nil habuit in tenementis*; for it denied the seisin in fee in Palmer, who had demised to him by deed, and so was bad in law. 2. That the plaintiff, who was assignee, should have the benefit of this estoppel, which runs with the land. 3. That the estoppel need not be replied, but should be taken advantage of on demurrer, and that the plea in the present case was bad on a general demurrer.

### 4. Of the Plea of Non est Factum.

Friend v. Eastbrook.  
2 Black. Rep.  
1152.

1. Where the defendant pleads *non est factum*, he cannot controvert the lessor's title; for the issue is only on the existence or goodness of the deed.

2 Co. 28.

2. "The defendant may, under this plea, shew that some of the covenants in the deed have been altered or erased, or he may plead it;" for if any covenant be altered or erased,

ended, the whole deed is discharged: for the deed is a compilation of all the covenants; so that by changing any, the deed remains no longer the same.

### 5. Of the Plea of Entry and Eviſion.

"This is a good plea in covenant, but it muſt be pleaded to be ſuch, as diſables the defendant from performing his covenant."

For where the leſſee covenanted to build an houſe upon the land within ten years, and he aſſigned the term; on action brought for non-performance, the defendant pleaded, That the leſſor had entered and held poſſeſſion for part of the ninth year. *Per cur.* The defendant ſhould have ſhewn that the leſſor entered by wrong, and held him out, ſo that he could not build; for perhaps the leſſor's entry might have been lawful as for non-payment of rent, which in fact was the caſe.

Barker v.  
Fletwell.  
Godb. 69, 20.

So where the covenant was by the leſſee to drain ſuch water out of the land before ſuch a day, and on covenant for non-performance, he pleaded, that before the day leſſor had entered and expelled him, and continued in poſſeſſion till after the day. This was adjudged to be a bad plea; for it was a collateral act, and he ſhould have ſet out "that he was prevented by the leſſor."

Carril v. Read.  
Cro. Eliz. 374.

"For if the covenant could be performed, an entry ſhall not excuſe the non-performance."

As where, on a demife of a meſſuage, with the appurtenances, the defendants covenanted to repair, and breach aſſigned in not repairing; the defendant pleaded an entry by the plaintiff into the back-yard of the meſſuage. The court held this to be no plea; for an entry into the back-yard could not ſuſpend the covenant to repair the meſſuage, of which he was ſtill in poſſeſſion, though by ſuch entry the rent was ſuſpended.

Snelling v.  
Stagg and  
Andrews.  
Mich. 26  
Car. 2. N. B.  
Buller N.P. 165.

### 6. Of the Plea of a Release.

If before a covenant is broken the covenantee releases to him all actions, ſuits, and quarrels, this doth not diſcharge the covenant itſelf; becauſe that at the time of the release there was no debt, duty, or cauſe of action.

Co. Litt. 292. b.  
Eccles v. Lambert.  
Alley 38.

But in that caſe, a release of all covenants is a good diſcharge of the covenant before it is broken.

But wherever a diſcharge is pleaded in the nature of a release, the defendant muſt plead it to be by deed, or it will

Rogers v. Payne.  
2 Will. 376.

be bad; for as the covenant is by deed, by deed only shall it be discharged. *Blake's case*, 6 Co. 44, a.

Middlemore v.  
Goodall.  
Cro. Car. 503.  
1 Roll. Abr. 411.

And note, That where a covenant runs with the land, and the lease has been assigned, the covenantee cannot release a covenant after it is broken, and action has been brought by the assignee; for the right of action is then attached in his person. But if the covenantee had released before a breach or action brought, it had barred the assignee even for a breach in his own time.

## 7. Of the Plea of Accord and Satisfaction.

6 Co. Blake's  
case, 43.

1. "*Accord and satisfaction* is another good plea in covenant: For though this action is founded on a deed, and a deed can only be discharged by a deed, yet this is a good plea; for it is not pleaded in discharge of the covenant itself, but only in discharge of the damages, for the covenant remains."

Alden v. Blague.  
Cro. Jac. 99.

As when to breach assigned on a covenant, the defendant pleaded an accord or agreement, "that the plaintiff should take thirty shillings in satisfaction of all damages;" it was on demurrer ruled to be a good plea, for the reason above: For in every action where damages are demandable by way of amends, accord is a good plea in discharge.

2. "But it is only a good plea *where there has been an actual breach*; for not till then are damages claimable."

Snow v.  
Franklin.  
Lutw. 358.

For where the plaintiff declared, that in consideration that he would permit *S. P.* to enjoy a farm at *Chipsbam* for one year, the defendant covenanted to pay the rent of 72l. *per ann.* and also 200l. then in arrear; and the breach assigned was, the non-payment of the rent. The defendant pleaded, that *before any cause of action did arise on the covenant*, that it had been agreed between him and the plaintiff, that the plaintiff *should take 30l. in discharge of all covenants*: which the plaintiff had accepted. On demurrer, this plea was held to be a bad one, for at the time there was no covenant broken, and accord and satisfaction is no good plea, except in discharge of damages for a covenant actually broken, or damages sustained.

Carter v.  
Downish.  
1 Show. 137.

8. Another plea is, that of *tender and refusal*. But in this action the damages, not the debt being the thing in demand, it need not be pleaded with an *uncore prift*.



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9. In covenant for non-payment of rent, the defendant cannot plead *levied by distress*; for that is a confession that it was *not paid at the day*, to which time the breach refers; but *riens in arriere*, or payment *at the day*, will be a good plea.

Hare v. Saville.  
2 Brownl. 275

10. *Infancy* is another good plea in this action; for an infant cannot bind himself by deed, except for necessities. This action was covenant against an apprentice, brought on the indenture, and held not to lie, he being an infant.

Gilbert v.  
Fletcher.  
Cro. Car. 129.

11. If the defendant has leave to plead double, under statute 4 and 5 *Ann. c. 16.* he shall not be allowed to plead inconsistent pleas, as *non est factum*, and a condition precedent.

Fifth v. Miller.  
Gilb. Rep. 123.

12. The plaintiff and defendant being joint lessees of a lease, the plaintiff released his part to the defendant, who covenanted to repair, pay rent, and indemnify the plaintiff. On covenant brought, and breach assigned as to all, the defendant pleaded *bankruptcy*, it was adjudged, That this being an *express* and collateral covenant, was not discharged under the bankruptcy and certificate, for it was not a *debt* due at the time of the bankruptcy, and so could not be proved under it.

Mayor v.  
Steward.  
4 Burr. 2444.

### 4. OF THE EVIDENCE IN THIS ACTION.

1. "Where the plaintiff declares in covenant on any deed, he shall not be allowed to go into evidence of any matter out of the deed to support his action; for the proof must correspond with the declaration."

As where the plaintiff declared on certain articles, whereby he undertook to build two houses for the defendant by a certain day (*the 1st of April*) in consideration of which the defendant undertook to pay the plaintiff 500*l.* and breach assigned in the non-payment, and averred performance, the defendant pleaded that the plaintiff had not finished the houses by the 1st of *April*, on which issue was joined: at the trial, it appeared that the parties had by a subsequent parol agreement enlarged the time, and that the work was finished within the time so enlarged; this evidence was held to be bad to support the declaration, and the plaintiff was non-suited; which the court on application refused to set aside.

Littler v. Hol-  
land.  
3 Term Rep.  
590.

2. "If the plaintiff assigns a breach generally, and afterwards narrows it to a particular matter, he shall be confined to give his evidence to such particular matter only."

As

**Harris v. Mantle.**  
3 Term Rep.  
307.

As where the breach assigned was "That the defendant had not used the demised premises in an husband-like manner; but, *on the contrary, had committed great waste, spoil, and destruction*; it was adjudged, that the evidence should be confined to the commission of waste, &c. and that the plaintiff should not be allowed to go into evidence of the not using the land in an husband-like manner if that did not amount to waste.

**Bell v. Harwood.**  
3 Term Rep.  
308.

3. Where the question is respecting the time of a demise from *A. B.* where both parties admit his title, he may be a witness; for this verdict cannot be given in evidence in any action, either for or against him.

Having now considered the nature of this action and the pleadings and evidence on it, the subsequent proceedings now alone remain, the Verdict and Judgment: but I shall previously mention this case relative to payment of money into court.

**Fullwell v. Hall.**  
2 Black. 837.  
**Walmouth v. Houghton.**  
2 Barn. 229.

Upon a general count in covenant, money cannot be paid into court; for the action is for *damages*, which are uncertain. But on a special count for a liquidated sum as for rent, or for 5*l.* per acre for ploughing meadow, the court will allow it.

## 5. OF THE VERDICT AND JUDGMENT.

**Vivian v. Campion.**  
Salk. 141.

1. Where covenant is brought, and breach assigned the not repairing of houses according to covenant, *the damages ought to be such as are sufficient to put the premises in repair at the time of the action brought*; and to that purpose they ought to be applied.

**Farrer v. Snelling.**  
1 Roll. Rep. 351.  
3 Bull. 155.

2. In covenant for non-payment of rent at divers days, which amounts to so much, and in the declaration the sum is mis-cast, it is not error, but the plaintiff shall have a verdict for so much as is really in arrear.

**A. non.**  
**Cro. Eliz.** 685.

3. Where the breach was assigned in two covenants, and it appeared that for one the plaintiff had no cause of action, and for the other a good cause of action, issue being joined on both, and a *general verdict found*, and damages entire, the judgment was arrested; for, for part, the plaintiff had no cause of action.

**Porter v. Harris.**  
1 Lev. 63.

4. If covenant be brought against *two*, and there be judgment by default against one, and the other pleads performance, which is found for him, the plaintiff shall not have judgment against the other; for, on the whole, the plaintiff has no cause of action.

5. In covenants perpetual, if they be once broken, and an action brought on the covenant and judgment for the plaintiff, this judgment shall stand; and in case of a future breach, plaintiff may have a *scire facias* on this judgment without bringing a new writ.

Swan's case.  
Cro. Eliz. 3.

And after a judgment by default, a writ of inquiry executed, and damages assessed, the defendant may move in arrest of judgment.

Chauntflower v.  
Priestley, et. al.  
executors.  
Cro. Eliz. 914.

And *Note*, That where there is a special penalty in a covenant (as a charter-party, *ex. gr.*) the plaintiff may either go for the penalty and rescind the contract, or bring an action on the case for breach of contract, and waive the penalty; in which case he may recover more than the penalty.

Winter v.  
Trimmer.  
1 Black. Rep.  
395.

## CHAPTER IV.

## The Action of Assault and Battery.

Finch's Law  
202.

1. " **A**SSAULT is the unlawful setting upon the person of any one, *by the offer or attempt to beat, tho'* without touching the person: As by raising a stick or fist to strike, making a blow at a person, but missing him: So lying in wait, besetting one's house, is an assault in law."

1 Hawk.  
P. C. 133.

But *words alone* will not make an assault, though, what might otherwise be deemed an assault, words might explain away: As if a person lays his hand on his sword, as to draw it, this might be deemed an assault; but when the party added, "If this was not affize-time, I would not take such language;" these words explained away the implied assault.

Anon.  
1 Mod. 3.

"Battery is the actual commission of violence to the person, as, by beating, striking, pushing violently, or doing any such injury, in an angry or spiteful manner."

"Under this head too falls *mayhem*, which is a more heinous kind of battery; that of wounding and depriving a person in consequence of it, of any member necessary for his defence: as an arm, hand, eye," &c.

In this action I shall consider, 1. What shall constitute an assault and battery: 2. What shall excuse it: 3. The pleadings on the part of the plaintiff and defendant: 4. The evidence: 5. The verdict, damages, and costs.

### 1. WHAT SHALL CONSTITUTE AN ASSAULT AND BATTERY.

1. "The act causing the injury to the plaintiff need not proceed from the immediate assault or act of the defendant;

"ant; for any wanton act by which another person or thing  
"causes a battery, will support this action."

As where the defendant threw a lighted squib into the market-place, which being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye. This action was adjudged to lie against the defendant, though the injury was not caused by the immediate act of the defendant himself.

Scot v. Shepherd  
3 Will 403.  
2 Black. Rep.  
892. S. C.

So, if a person pushes a drunken man against another, and hurts him, this is actionable, as an assault and battery. But if the defendant intended to do a right act, as to assist him in going along the street without help, and in so doing an injury is done, he will not be answerable.

Short v. Love-  
joy. coram Lec.  
C. J.  
G. Hall. 1752.  
Buller N. P.  
16.

2. "To constitute an assault the injury should be wilful, or proceed from want of due care; "for if not wilful, and "done without default, the action will not lie." As if a soldier at exercise, by accident, hurts his companion, it is not actionable; but it would be otherwise if it proceeded from neglect, or want of due care.

Weaver v.  
Ward.  
Rob. 138.

As if by a sudden fright an horse runs away with his rider, and runs against a man, it is no battery, and this may be given in evidence on the general issue; but if any person had whipped the horse, and made him run away with the rider, and hurt a third person, or the rider himself, he would be liable who had whipped the horse.

Gibbons v.  
Pepper.  
4 Mod. 405.  
Salk. 6. 37.  
S. C.

3. "Where a person receives a bodily injury in consequence of an act done by his own consent, he shall not maintain this action."

As where two persons played at cudgels by consent, and one hurt the other, it was held to be no battery; for *volenti non fit injuria*.

Dalt. c. 22.

"But in such case the act from whence the injury proceeds must be lawful."

For where, in this action, the defendant would have given in evidence that the plaintiff and he boxed by consent, from whence the injury proceeded, it was held to be no bar to the action; for as the act of boxing is unlawful, the consent of the parties to fight could not excuse the injury.

Boulter v. Clerk  
at Abingdon.  
1747.  
Bull. N. P. 16.

And in this case it was held, That if one licence another to beat him, such licence is void, because it is against the peace; and the plaintiff had in this case a verdict and damages.

Mutlow v.  
Ollerton.  
Comb. 218.

And

*Hill v. Tempest.* And note, That if two commit a battery, and one of them dies after issue joined, yet shall the action continue against the other.  
*Cro. Eliz. 145.*

## 2. WHAT SHALL EXCUSE OR JUSTIFY THE DEFENDANT IN THIS ACTION.

1. "Wherever a person is *acting under any authority given to him by law*, that shall be a sufficient justification.

*Hawk. P. C.*  
 130.

As, 1. "If an *officer* has a writ or warrant against a person *who will not suffer himself to be arrested*, he may justify "a beating or even wounding, in the attempt to arrest "him."

*Williams v.*  
*Jones.*  
 2 *Str.* 1049.  
*Titley v.*  
*Foxhall.*  
*Trin. 31 Geo. 2.*  
*C. B.*  
*Bull. N. P.* 19.

But a *battery* cannot be justified by an *arrest only*, it will only justify the assault; for to justify a battery, *resistance* or an attempt to rescue himself out of custody, should be shewn, unless it be by way of *molliter manus imposuit*, in which way alone the defendant may justify the beating, without shewing any resistance or attempt to rescue.

*Bateman v.*  
*Woodcock.*  
*Cro. Jac.* 372.

And where a person justifies an assault and battery by virtue of a sheriff's warrant, *he need not shew the warrant*; for that must be returned to the sheriff.

*Howe v.*  
*Planner.*  
 1 *Saund.* 13.

2. So in the exercise of his office a *churchwarden* may justify taking off the hat or laying hands on a person who is *disorderly in church*, and turning him out for disturbing the congregation; but it must be by a *molliter manus imposuit*.

*Lane v. Deg-*  
*berg.*  
*Hill. 11 W.* 3.  
*per Treby*  
*C. J.*  
*Bull. N. P.* 10.

3. So the defendant may justify even a *mayhem*, if done by him as an *officer of the army*, as a *punishment* to the plaintiff for *disobedience of orders, or other military crime*: and the defendant may give in evidence a petition by the plaintiff to a council of war against him; and if by their sentence the petition was dismissed, it is conclusive evidence for the defendant.

*Leeward v.*  
*Bafely.*  
 1 *Ld. Raym.*  
 62.  
*S. C.*

4. A man may justify against any one *who assaults his wife, parent or child*, in their defence: So a wife may justify an assault in defence of her husband. A servant may in like manner justify an assault in defence of his master; but a master cannot justify an assault in defence of his servant\*: for the master may have an action against the person who beats his servant, with a *per quod servitium amisit*; but the servant can have no such action for beating his master.

\* *Tamen quare*  
*Vid. 3 Bac.*  
*Abr.* 568.

*Same case.*  
 and 1 *Hawk.*  
*P. C.* 130.

5. So one may justify the battery of a person who endeavours wrongfully to *dispossess him of his lands, or to take away his*

*his goods* : but in the case of an entry on the lands, it must not be justified as a battery, but as a *molliter manus imposit.*

And where the injury is a mere breach of a person's close, the defendant cannot justify a battery *without a request to depart* : but it is otherwise if one breaks down a gate, or enters *vi et armis* ; for there it is lawful to oppose force with force. Green v. Goddard.  
2 Salk. 641.

6. " *A parent may give reasonable correction to his child ; a master to his servant or apprentice ; a schoolmaster to his scholar, or a gaoler to his prisoner.*" All these, therefore, are special justifications. Hawk. P. C. 130.

7. " Wherever the assault or battery has proceeded from the plaintiff's own fault, it is a sufficient justification for the defendant."

As where the plaintiff and defendant being at play, the plaintiff thrust his money into defendant's heap ; upon which the defendant kept it, and then a dispute and struggle took place, which was the assault for which this action was brought. The court held the defendant justified, and not guilty ; for the first fault proceeded from the plaintiff, as so a man might be made a trespasser against his will. Ward v. Ayre.  
Cro. Jac. 366.

8. Under this head falls the most usual justification in this action, viz. " That of *son-assault demesne*, or that the first assault proceeded from the plaintiff himself."

If the defendant proves that the plaintiff first lifted up his stick to strike him, and offered so to do, it is a sufficient assault to justify his striking the plaintiff ; for he need not stay till the plaintiff has actually struck him, for he might be disabled by the blow. Bull. N. P. 18

" But there must be some proportion between the battery given and the first assault ; for every assault, however small, will not justify an enormous battery."

And the rule is laid down by Lord Holt, in this case, who held, That the meaning of the plea of *son-assault* was, that the defendant struck in his own defence ; so that if *A.* strikes *B.* and a scuffle ensues, and the parties close immediately, and in the scuffle *A.* is even mayhemed by *B.* that is to be justified under *son-assault* : But if, upon a little blow given to *B.* he gives a blow in return, which mayhems *A.* that is not justified under *son-assault demesne* : for the reason why *son-assault* is a good plea in mayhem is, because it might be such an assault as would endanger the defendant's life. Cockcroft v. Smith.  
2 Salk. 642.

Therefore,

S. C.  
1 Ld. Raym.  
177.

Therefore, in this case the Chief Justice directed the jury to give a verdict for the defendant in a mayhem, the first assault being by tilting the form whereon the defendant sat.

Francis v. Ley.  
Cro. Jac. 367.

But if the assault has happened in a *church-yard*, *son-assault demefne* will not justify the defendant; for the law so abhors violence in churches or church-yards, that it will not allow a man to strike there, even in his own defence.

### 3. OF THE PLEADINGS.

#### I. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

Michel v.  
Neal & ux.  
Cowp. 828.

1. The declaration in assault and battery cannot lay the offence on a day certain, and *at divers other days* and times; for an assault is one individual act, a distinct offence, and cannot be laid with a *continuando*.

Ameyon v.  
Shore.  
2 Stra. 621.

2. The offence should be charged fully and positively, and not by way of recital, as "*whereas A. B. on such a day made an assault.*" This is where the action is by bill in the *King's Bench*.

White v. Shaw.  
2 Will. 203.

For in the court of *Common Pleas* such declaration would be good; for in that court the writ being set out in the declaration, helps the want of a positive averment.

Douglas v.  
Hall.  
1 Will. 99.

But if the declaration is so in the *King's Bench*, the defendant should take advantage of it by special demurrer; for it will be good after a verdict.

Newton v.  
Hatter.  
2 L. Raym.  
1208.  
Horton v.  
Byles.  
Sid. 387. S. P.

3. For a battery of the wife, the husband and wife should join in the action, and the damages be laid *ad damnum ipsorum*: first, Because the husband is damnified by being put to expence for her cure, and in suing the action: and 2dly, Because the action and damages survive to the wife, to whom the injury had been committed.

Newton v.  
Hatter, supra.

And therefore, where the action was by husband and wife, for a battery of the wife, and laid *ad damnum ipsorum* (*viz.* the husband) the judgment was arrested; for so the damages would not survive to the wife, they being recovered only to the husband. So if the assault and battery has been committed against *both husband and wife*, he must bring his action alone for *the injury done to himself*; for the wife cannot join in an action for an injury done to the husband: and therefore where a joint action was brought for such battery

Cro. Jac. 655.



battery and damages separately assessed the writ abated *quoad* the husband.

4. The plaintiff, in his declaration in this action, may lay many things in aggravation, for which he himself could not maintain an action: As here, "for making an assault on himself, entering his house, and assaulting his servants," &c. Newman v. Smith.  
Salk. 642.

5. If the defendant pleads *son-assault demesne*, and the plaintiff can justify, he should plead it; for he cannot give it in evidence under the general replication of *de injuria sua propria*. King v. Phippard.  
Comb. 288.

Note, In this action, as in all others founded on torts, if the battery has been done by several, the plaintiff may bring his action either jointly or severally.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. To this action there are three species of defence: The first is the *general issue*, not guilty; the second, *matter of excuse*, as, that it was done by accident, and without the defendant's default, &c. which may also be given in evidence on the general issue: the third is a *justification*, which insists upon some matter which made it lawful for the defendant to make the assault. But a *justification must always be pleaded, and cannot be given in evidence on the general issue*, as upon the general issue he cannot give *son-assault demesne* in evidence; for it is a justification, and so of other causes of justification which we have treated of before. Ball. N. P. 17.  
Co. Litt. 281. b.

But where in an action for an assault and false imprisonment against the captain of a ship, who pleaded *not guilty*; the defendant cross-examined the plaintiff's witnesses as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to create mutiny and disobedience. Though this evidence was objected to by the plaintiff's counsel, yet the judge admitted it, holding as good evidence in mitigation of damages *what was said at the time*; for every thing which passed at the time was part of the transaction on which the plaintiff's action was founded, and he therefore could not be surprized by the evidence. Bingham v. Garnault.  
Sitting London  
Aff. 1788.  
coram Buller, J.

2. "If an *indictment* has been preferred for the same assault and the defendant confessed it, and a *cognovit indictment* been entered on the record, it estops the defendant to plead not guilty to an action for the same offence." 2 Hawk. 333.

3. If

Gibbon v.  
Pepper.  
Salk. 677.

3. If the defendant *justifies* the assault and battery, he must *confess* it, or, on demurrer, the plaintiff shall have judgment.

4. "The plea should go to the whole offence as charged in the declaration, or the plaintiff shall have judgment. But if the plea is a justification, it shall go only to that part of the offence of which it takes notice: *son-assault* goes to the whole."

Pindlebury v.  
Elmott.  
Cro. Eliz. 268.

For where, in trespass for assault, battery, and *wounding*, the defendant pleaded, that he was constable of D. and for a misdemeanor of the plaintiff's that he had laid hands on him, and carried him to the stocks, *quæ est eadem transgressio*. On demurrer, the plaintiff had judgment; for the plea is a justification, and goes only to the assault and battery, but takes no notice of the *wounding*, which is charged in the declaration.

"Neither is the general traverse as to the rest, sufficient."

Truscott v.  
Carpenter.  
1 Ld. Raym.  
229.

For where, in assault, battery, and *false imprisonment*, the defendant *justified the imprisonment*, under process of an inferior court, but said nothing more than a general traverse to the assault and battery, the plaintiff had judgment; for it was not sufficient to justify the imprisonment alone, tho' it includes a battery; but the defendant should have pleaded to the assault and battery, by shewing resistance made to the arrest.

Barfoot v.  
Reynolds.  
2 Stra. 953.

4. In an action against a *servant*, if he pleads a justification in defence of his master, he must plead it thus: "That the plaintiff would have struck his master if he had not interposed, and struck the plaintiff, *prout ei bene licuit*." For the servant can only strike to *prevent an injury*, not by way of revenge; and therefore where the servant pleaded "That the plaintiff having struck his master in his presence, that he in his master's defence struck the plaintiff," the plea was held to be ill on demurrer, for the assault on the master might be over when the servant struck the plaintiff.

Leward & ux.  
v. Baskely.  
1 L. Raym.  
62.

So in an action against the husband and wife, the wife may plead that plaintiff was going to wound the husband, and that she, *insultum fecit*, to defend him, and prevent the plaintiff from beating him.

"But in this or any other plea, the wife cannot plead alone, the husband must always join."

Watson v.  
Thorpe & ux.  
Cro. Jac. 239.

In assault and battery against the husband and wife, he pleaded that his wife was assaulted, and that he in aid of and defence

defence of her, assaulted the plaintiff, &c. She pleaded *non-assault demesne*. There was a general replication to both pleas of *de injuria sua propria*, and damages entire; and afterward a repleader was awarded, for reason that the *feme* had pleaded alone, which she could not do.

6. "A former recovery of damages in an action for the same offence is a good plea in bar."

"And if the plaintiff has once recovered damages for the assault and battery, he cannot afterwards recover in a new action, for any further mischief or injury arising from the same battery."

As where, after the plaintiff in this action had recovered damages for the battery, a piece was cut out of his skull, in consequence of the former wounding, for which he brought a new action, it was held not to lie; for the battery itself is the ground of the action, and the injury the measure of the damages; but here the ground of the action was gone by the first recovery. Fetter v. Beale. Salk. 11.

So if a battery has been committed by several, and a recovery had against one, such recovery may be pleaded in bar to an action brought against any of the others for the same battery; for plaintiff can receive but one recompense for the same injury. Yelv. 68.

7. If the defendant justifies an assault and battery under a writ to the sheriff, and warrant directed to him to arrest the plaintiff, he should set out from what court the writ issued, or it will be bad. Here he justified under a writ returnable in *C. B.* and it was held ill; for it might be a writ out of the *K. B.* or *county palatine*, which cannot be returnable in the *Common Pleas*. Gray v. Hart. 2 Salk. 517.

8. By statute 21 Jac. 1. c. 16, "all actions of assault and battery must be sued within four years; and this statute must be pleaded in bar."

Therefore where to this action defendant pleaded by mistake *non culp. infra sex annos*, it was on demurrer held to be a bad plea. Blackmore v. Tiddlerley. Salk. 442.

9. The defendant cannot plead double under the statute, the general issue *not guilty*, and a justification; for they are contradictory, since a justification must admit what the general issue denies. 2 L. Raym. 1099. S. C. Palmer v. Wadbroke. 2 Stra. 876.

10. This being a transitory action, in which the time or place are merely inducement, the place cannot be traversed without special cause of justification, which extends to some certain place: as if a constable of a town of another county Co. Litt. 282.

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county arrests the body of a man that breaketh the peace there, he may traverse the county, but he must not rest there, but all other places saving in the town whereof he is constable.

Note, By stat. 7 Jac. 1. c. 5. If trespass in assault or battery is brought against any justice of peace, constable, &c. for any thing in execution of their office, *they may plead the general issue*, and give the special matter in evidence.

### 4. OF THE EVIDENCE.

#### 1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

Per Pratt. J.  
1 Stra. 68.  
1 Sid. 325.  
Rex v. Warden  
of the Fleet.  
Per Holt. arg.  
Cal. K. B. 339.

1. As the plaintiff in this action may also prosecute the defendant by indictment for a breach of the peace, it is to be known that the plaintiff cannot give in evidence in the action *a conviction on an indictment for the same assault*; for it is a rule of evidence, that no verdict shall be given in evidence except where the parties have been the same, and in one case the King is one of the parties, and in the other the plaintiff: Nor is any thing to be admitted in evidence of which both parties have not equal benefit; that is, such as either party should be equally at liberty to give in evidence, in case it made for him.

2. "The plaintiff was in a case of assault allowed to give in evidence what was felony."

Westbrook v.  
Strutville.  
1 Stra. 79.

As where in assault and battery, the defendant gave in evidence, *that he was married to the plaintiff*; and to take away that evidence, the plaintiff was admitted to prove *that she had another husband living when she married the plaintiff*.

Guy v.  
Kitchenor.  
2 Stra. 1271.

3. In this case the memorandum was generally of *Michaelmas term*, and *son-assault* being pleaded, the fact was proved *at a day within the term*: a case being made, the court held it well enough, for the plaintiff need have given no evidence on this plea, unless to aggravate damages; and the court will not nonsuit him, because it is amendable by a new bill.

#### 2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Downes v.  
Skrymsher.  
Brownl. 233.

There is a difference to be observed between what may be given in evidence on the issue of *son-assault demesne* and

as not guilty. If the defendant pleads *son-assault demesne*, and the plaintiff replies *de injuria sua propria*, &c. the plaintiff shall not be allowed to give in evidence a battery at another day and place than that laid in the declaration. But upon not guilty pleaded, the plaintiff may give in evidence an assault and battery at any time or place.

2. In an action by husband and wife, for a battery of the wife, on the general issue pleaded, the defendant shall not be allowed to prove or to go into evidence that the woman is not wife to the plaintiff; it should be pleaded in abatement, that so the plaintiff might meet the objection fairly. Dickinson v. Davis.  
1 Stra. 480.

## 5. OF THE VERDICT, DAMAGES, AND COSTS.

It is previously to be observed, that in cases of very gross assault, in which it is apparent that the damages will exceed 10l. the court, or any judge of the court, may give leave to the plaintiff to sue out a writ with a clause of *ac etiam billæ*, and hold the defendant to special bail. 1 Sid. 307.  
Raym. 74.

### I. OF THE VERDICT AND DAMAGES.

1. In assault and battery, if the jury find upon the plea of not guilty, the defendant guilty in another town, or at another day, than the plaintiff has laid, yet shall the plaintiff recover, for it is transitory. Litt. § 485.

2. "As to the damages, it is a general rule, That the plaintiff shall have but one recompense in damages, tho' the assault and battery be committed by several, and though his action be brought either joint or several."

As where in assault and battery against two, one pleaded *not guilty*, and the other *son assault demesne*, and both issues were found for the plaintiff; it was held, That there should be but single damages assessed. So where one defendant had pleaded specially, and the plaintiff demurred, and had judgment on demurrer, it was adjudged that there should be but single damages assessed. Crane and Hill.  
v. Hammerstone.  
Cro. Jac. 118.  
Sir J. Heydon's case.  
11 Co. 6, 7.

Therefore where the plaintiff declares jointly, the jury cannot sever the damages so as to give greater against one than another. But if the jury find otherwise, the plaintiff may enter a *noli prosequi* against all but one, and have judgment against him. Rodney v. Strode.  
Carth. 19.

"But in this, as well as other actions of trespass against several,

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"several, the jury may find some guilty, and others not guilty."

Cofgrove v. Hill  
Sitting Trin.  
30 G. 3. cor.  
Buller, J.  
MSS.

But in this case where the action is joint, and no part of the evidence applies to one, the plaintiff must elect to proceed against the rest, and that one have a verdict. But in such case, if there was good cause to make him a defendant, the judge will certify.

Dafe v. White  
& ux.  
Show. 350.

And so in the case of a battery against husband and wife, the jury may find the wife guilty, and the husband not guilty; and *vice versa*.

Cook v. Beal.  
1 Ld. Raym.  
176.

3. Where there has been a *mayhem*, or wounding, the court may upon view increase the damages, even though a *mayhem* was not laid in the declaration; but under the following restrictions, viz. 1. The judge who tried the cause at *Nisi Prius*, may not himself increase the damages; he ought to certify it by indorsing on the *posita* what maim or wound was proved: unless he is a judge of the same court wherein the motion is made for increase of damages.

S. C.

Latch. 223.

S. C.

2. The plaintiff must always be present in court when the motion is made for increase of damages.

Style 245.  
S. C.

3. The manner of wounding should have been stated in the declaration.

4. "Upon a motion to increase the damages *super visum vulneris*, it should be proved to be the same wound for which the damages were given."

Smallpiece v.  
Beckenham.  
Mich. 27  
Car. 2. C. B.  
Ball, N. P.  
21.

For where the maim in this case was the loss of an eye, the court ordered the defendant and the witnesses to appear and be examined, and several of the jury who tried the cause, and it appearing that no evidence had been given at the trial of the loss of an eye, the court would not increase the damages for that, for new evidence should not be admitted.

Brown v. Seymour.  
1 Will. 5.

5. But where the judge who tries the case certifies or declares that he is satisfied with the verdict, the court will not increase the damages.

Burton v.  
Barnes.  
1 Barnes 106.

6. In this case on a view of the party, and examination of the surgeon, *ore tenus*, in court, the damages were increased from 11l. 14s. to 50l.

## 2. OF COSTS.

1. By statute 22 and 23 Car. 2. c. 9. "In actions of assault and battery, if the damages recovered are under forty

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"forty shillings, the plaintiff shall have no more costs than damages, unless the judge shall certify that the assault and battery were sufficiently proved; and if any more costs are given, the judgment shall be void, and the defendant be acquitted, and have his action against the plaintiff for such vexatious suit, and recover his costs and damages in any court of record."

It seems not to be completely settled whether in a case of this nature it is discretionary in the judge to certify or not: in this case *Mr. Justice Foster* held, That it was perfectly discretionary to give or with-hold the certificate. Bayley v. Taylor.  
Gloucester Lent Ass. 1757.  
MSS.

But it was there said, That *Justice Wilmut* had held otherwise.

But, 1. "The action must be solely an action of assault and battery to deprive the plaintiff of his costs; for if it is coupled with any other offence which does not require a certificate, and the defendant is found guilty, that shall take it out of the statute, and give the plaintiff full costs."

For where in trespass for an assault and battery, breaking a standard and roller, and taking and carrying away divers goods and chattels; the defendant was found guilty of all, except the taking and carrying away, and damages found under forty shillings. On the question arising concerning the costs, the court held, That though the assault and battery alone might require a certificate, yet that part concerning the breaking the standard and roller not requiring it, and both making one cause of action, that the plaintiff should have his full costs. Millbourn v. Read.  
Trip. 17, 18  
Geo. 2. C. B.  
quot.  
3 Will. 322.

2. "But this matter to entitle the plaintiff to full costs where the damages are under forty shillings, must be charged, and found as a substantive issue, and independent of the assault; for where it is merely part or a consequence of the assault and battery, there shall not be full costs."

For where the action was for assaulting the plaintiff, and tearing his coat, which the jury found to be a consequence of the battery, and damages under forty shillings, the plaintiff had no more costs than damages. Cotterill v. Tolly.  
1 Term Rep. 655.

So where the declaration was, that the defendant assaulted the plaintiff, pushed him down on the ground, the ground being covered with water, whereby his coat was wet and spoiled, and he became sick and weak: after verdict for the plaintiff, and damages twenty shillings, there being no certificate, the court held the plaintiff not entitled Hamson v. Adhead.  
Sayers Rep. 91.  
Buller N. P. 329. S. C.

tied to full costs, for the spoiling of his coat was not a distinct thing from the assault, but an injury arising from the original cause of action, and a consequence of it.

**Clark v. Obery.** So where the action was assault and battery, with a *non insultum fecit* on the plaintiff's horse, and damages under 40s. the special matter as to the horse was held not to entitle the plaintiff to full costs, it being part of the same offence.

2. " Though another offence be joined as the consequence of the assault and battery, if that is an offence in itself actionable, though the damages are less than 40s. yet the plaintiff shall have his full costs."

1 Str. 192.

As in trespass for an assault and battery, of the plaintiff's wife or servant *per quod consortium* or *servitium amisi*, and damages under 40s. yet shall the plaintiff have his full costs; for the special damage is the gift of the action, and of itself actionable.

**Richards v. Turner.**  
Trin. 6 Geo. 1.  
C. B.  
**Buller N. P.**  
330.

If the defendant justifies, he admits the battery, and in such case no certificate is necessary to entitle the plaintiff to full costs, if the damages are under 40s.; for the judge could only certify that the assault and battery was well proved, which the defendant admits. But if the defendant justifies, and the plaintiff makes a new assignment, to which the defendant pleads not guilty, if the damages are under 40s. the plaintiff must have a certificate to entitle him to full costs.

" But the justification must be both of the assault and battery, in order to entitle the plaintiff to full costs."

**Page v. Creed.**  
3 Term Rep.  
391.

For where in an action of trespass for an assault and battery, the defendant pleaded first not guilty to the whole; and, secondly, a justification of the assault only, and the damages one shilling; it was resolved, That the justification not going to the battery, and there not being any certificate, that the plaintiff should have no more costs than damages.

3 Will. 346.

For the certificate under stat. 22 & 23 Car. 2. must be that the assault and battery was well proved; not the assault alone; and therefore a justification of the assault only is not sufficient.

4. And by statute 8 & 9 W. 3. c. 10. § 4. " If the judge shall certify that the trespass for which the action was brought was wilful and malicious, though the damages were under 40s. yet shall the plaintiff have his full costs."



And where there was an assault only, and no battery, <sup>3 Will. 326.</sup> but that appeared to be *wilful and malicious* (as drawing a sword and attempting to stab the plaintiff) Lord Chief Justice *Willes* said, That he would certify under this statute, in order to give the plaintiff his full costs, as the damages were under 40s.

AS TO COSTS TO THE DEFENDANT,

By stat. 8 & 9 *W. 3. c. 11.* "Where there are several defendants in an action of assault and battery, and one or more shall be acquitted, the person so acquitted shall be intitled to his full costs, unless the judge certifies that there was reasonable ground for making him a defendant." *Ante 322, Cosgrove v. Hill.*

2. By stat. 7 *Jac. 1. c. 5.* "In actions of assault, battery, and false imprisonment, brought against *justices of peace, mayors, bailiffs, or constables*, for any thing done by virtue of their offices, if they have a verdict, or the plaintiff discontinue, or be non-suit, they shall have double costs."

For constructions on this statute, *vid. post*, Ch. *Trefpafs.*

And by statute 21 *Jac. 1. c. 12.* the provisions of the last act are extended to *churchwardens and overseers of the poor.*

## CHAPTER V.

## The Action of False Imprisonment.

**T**HE offence of *False Imprisonment* consists in the unlawful detention of the person without any legal authority: it is therefore necessary to constitute this offence, to determine what detention is unlawful.

2 Inst. 589.

Every detention of the person, as by confinement either in a prison or private house, in the stocks, or by forcibly detaining one in the street, is an imprisonment.

I shall therefore consider, 1. What arrests or detentions are illegal, and as such will support this action: 2. What are legal, and so afford a good justification to the person sued in this action for the arrest or detention: 3. The pleadings and evidence on the part of the plaintiff and defendant: and, 4. The verdict and damages.

Greenvelt v.  
Barwell.  
Salk. 396.

But it is previously to be observed, that no action of false imprisonment lies against a *judge of a court of record*, for any act done by him in execution of his office, nor for any mistake of judgment: Neither are his acts or decisions traversable. This was decided in this action brought against the officers and censors of the college of physicians, who having a power to examine and punish by fine and imprisonment, were held to be a court of record.

## I. WHAT ARRESTS OR DETENTIONS ARE ILLEGAL.

Arrests are illegal, 1. Considered with reference to the person arrested: 2. To the writ or process: 3. To the court from whence it issues: 4. In cases reducible to no certain head.

## I. OF ILLEGAL ARRESTS WITH REFERENCE TO THE PERSON.

Barker Execu-  
tor v. Braham &  
Norwood.  
3 Will. 368.

1. An *executor or administrator* can only be arrested for a debt of testator's or intestate's, on a *suggestion of a devisor*.

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it; therefore, where no such suggestion was made, and the plaintiff who had administered to her husband was arrested for a debt due by him in his life-time, this action was adjudged to lie against the plaintiff in that action, and the attorney in it who had sued out the writ. It was contested in this case, that the action should not lie against the attorney; but the court held him liable, the offence being a trespass in which all are principals.

“ But a distinction is to be observed between arrests of persons not liable to arrests, and arrests of persons who are liable in general, but have a particular privilege or exemption; for the arrest of these last is not illegal, nor subjects the party to this action.”

As where the plaintiff was a witness in a cause at Westminster, and was arrested by the defendant in returning from thence, false imprisonment was held not to lie against the party who arrested him; for the exemption from arrests is a privilege not of the person but of the court, and the writ is not void, for the suit continues, though the party may be discharged on motion.

Cameron v. Lightfoot.  
2 Black. Rep. 1190.

So in the case of other privileged persons, as peers, certificated bankrupts, insolvent debtors, or such like, no action of false imprisonment lies for arresting them; but in such cases the action was held clearly not to lie, as against the officer who made the arrest, for he was at all events justified by the writ, which was compulsory.

Tarlton v. Fisher Dougl. 646.  
Counts of Rutland's case. 6 Co. 52, b.

But in case of an arrest on a Sunday, the process being declared by the statute to be void, this action will lie.

Wilson v. Tucker. Salk. 78.

2. “ In actions against the husband and wife, the arrest is only legal, if made in pursuance of these cases.”

1. If the action is against the husband and wife, for a debt of the wife *dum sola*, and judgment for the plaintiff, the *capias* shall issue to take the bodies of both husband and wife in execution, for it must follow the judgment.

Bardolph v. Perry & ux. Moor. 701.  
Wilnot v. Butler. Sayer Rep. 149.  
Langstaff v. Rain. 1 W. lll. 149.

So in an action against the husband and wife for an assault by the wife, it was held that both might be taken in execution.

But this is the case only in arrest on final process; for in the case of *mesne process*, where both was arrested for a debt of the wife's, *dum sola*, she was discharged, and he retained till he found bail for both.

Harrison v. Bearcliff. 2 Stra. 1272.

So where *non est inventus* was returned as to the husband to a writ against both, and the wife only arrested, she was discharged

Edwards v. Rourke ux. 1 Term Rep. 486.

discharged out of custody, though the fact was for a debt of the wife's, *dum sola*.

Roberts v.  
Andrews.  
2 Black. Rep.  
720. and case  
ibid.

So where an interlocutory judgment was signed against both, and a *sci. fa.* issued against the bail, who surrendered them into custody *before execution*, the wife was discharged.

Doyley v.  
White.  
Cro. Jac. 323.

2. But if the action had been originally commenced against the wife *when sole*, and pending the suit she marries, and the plaintiff has judgment, the *capias* shall issue against *the wife only*, and not against the husband.

Anon.  
Cro. Car. 513.

3. But on all judgments obtained on the wife's contracts, or for her torts committed *during coverture*, the writ shall go against the *husband alone*.

3. "Where a writ issues against any one, and the officer mistakes the defendant, and executes the writ by *arresting a wrong person*, the person so arrested may maintain this action, even though he was himself accessory to such false arrest."

Coot v.  
Lightworth.  
Moor 457.

As where in false imprisonment the defendant justified, that he having a warrant against *J. S.* asked of the plaintiff his name; who answering *J. S. which was not his true name*, the defendant arrested him; on demurrer this plea was held to be bad, for the officer must take the right person at his peril.

Thurbane's case.  
Hard. 323.

So where a commission of rebellion issued against one *Thurbane*, and a person of the name of *Green* appeared before the commissioners, and affirmed himself to be *Thurbane*, and being apprehended, he resisted and snatched the commission and tore it in pieces. For this on an attachment it was ruled by Chief Baron *Hale*, that though he had *falsely affirmed himself to be Thurbane*, yet that would not excuse the commissioners from false imprisonment, for they had no warrant to arrest *him*.

But in such case, though mistake will not excuse, yet it will go very far in mitigation of damages.

## 2. OF ILLEGAL ARRESTS WITH REFERENCE TO THE WRIT, OR OTHER PROCESS.

This is, 1st, Where the process is void: 2dly, Where it is irregular.

### 1. In the Case of Void Process.

The plaintiff, in this action, was arrested by the now defendant, by a writ of *capias ad respondendum, returnable the*

the term next but one to the *teste* (it was of *Trinity term*, and returnable in the *Hilary* following): this writ being irregular and void (as every writ of mesne process should be returnable the next term to the *teste*, for otherwise the defendant might be imprisoned for a long time) false imprisonment was adjudged to lie against the now defendant, who was plaintiff in the former action; though it was agreed that this writ had been a good justification to the officer.

Parsons v. Lloyd.  
3 Will. 341.  
2 Black. Rep. 845. S. C.

## 2. In the Case of Irregular Process.

As where the defendant in a former action (the plaintiff in this) had been arrested by a *ca. sa.* founded on a judgment, which was afterwards set aside for irregularity; it was adjudged, that he might well maintain this action for the arrest. And a distinction was taken between process irregular and erroneous; viz. "That if erroneous, it is the act of the court, and the party shall not suffer; but if it is irregular, it proceeds from the act of the party or his attorney, and an action will lie on it."

Phillips v. Biron.  
1 Stra. 509.

And the process of arrest has been held irregular and void in the following cases:

### 1st. "Where filled up without proper authority."

1. As where *Burslem* the plaintiff being indebted to one *Jones*, *Jones's* attorney sued out a writ against him, but the under-sheriff left a blank in the writ for the name of a bailiff, and *Jones's* attorney inserted the name of *Fern* (the defendant) who arrested the plaintiff. False imprisonment was adjudged to lie against *Fern*, for the arrest was illegal, as the under-sheriff should have inserted the name in the writ of some sheriff's officer; for by leaving it to the attorney, he might nominate persons of no property, or infamous characters, who might be guilty of oppression, and have nothing to answer to the party injured: the arrest should be by the officers of the sheriff, who have given security to him.

*Burslem v. Fern*,  
2 Will. 47.

### 2dly. "Where it has issued informally."

"The defendant in this case justified an arrest of the plaintiff, by process out of the Vice-Chancellor's court of *Oxford*, and shewed that by the custom a plaintiff making oath of his cause of action, and that he believes that the defendant will abscond, may have a warrant to arrest him and hold him till security given, and then shews, that he made

*Smith v. Boucher*.  
1 Stra. 993.

made such oath of his cause of action, and that *he suspected* that the defendant would run away; upon which he had a warrant from the Vice-Chancellor, and arrested the now plaintiff. Upon demurrer, the court held the custom not to be pursued, for the custom is to swear to the *belief* of the defendant's intention to abscond, and here the plaintiff only swore to his *suspicion*, which is not the same; for that may be a ground of suspicion which will not induce a belief, and the arrest being therefore made under the custom, was illegal, and that so the party might have this action of false imprisonment.

Johns v. Smith.  
Cro. Jac. 514.

3. When the process was *not returnable on a day certain*, under which the defendant had been arrested, the writ was adjudged to be void, and this action to lie for the arrest.

2 Will. 226.

4. Where the defendant was arrested, and *the affidavit to hold him to bail was irregular*, saying *in indebted* for is *indebted*, so that he was intitled to be discharged: Justices Clive and Gould were of opinion, That this action lay against the plaintiff, or filazer, for such arrest.

Allen v. Allen.  
2 Black. Rep.  
694.

5. Where a judgment is of one county, the defendant cannot be arrested in another, without *testatum capias*, or suggestion that the defendant was commorant in such other county. In such case, therefore, where the defendant was so arrested, without any *testatum* or suggestion, this action was held to lie.

### 3. OF ILLEGAL ARRESTS, WITH REFERENCE TO THE COURT OR MAGISTRATE WHO HAS ISSUED THE PROCESS.

This is, 1. By issuing process *where it has no jurisdiction*:  
2. *Where it exceeds or does not pursue its jurisdiction*: 3. *Where the subsequent proceedings are irregular*.

#### 1. Where there was no Jurisdiction.

Higginson v.  
Martyn & Had-  
ley.  
Mic. 28 Car. 2.  
Buller N. P. 93.

1. If a person is arrested by process out of an *inferior court not having jurisdiction*, he may have this action against the plaintiff in that action; and his having pleaded to that action in the inferior court shall not be such an admission of the jurisdiction as shall bar him of his action for the false imprisonment; for every one should know the extent of that court's jurisdiction to which he applies for redress.

#### 2. Where

## 2. Where the Inferior Court exceeds, or does not pursue its Jurisdiction.

1. "And wherever an authority to commit is given by statute, it must be strictly pursued." As in the case of *Smith and Bouchier*. *Ante*, 329.

1. So where, by statute 14 H. 8. all persons are forbid to practise physic in London, or within seven miles of it, unless allowed by the president and censors of the college of physicians; and four censors are appointed yearly, who may punish by fine and imprisonment persons offending in practice, *non bene utendo et exequendo facultate medicinæ*. The plaintiff practised in London without being so allowed, and being summoned, he said *he would practise without their permission*; for which, by warrant from the president and censors, he was committed to the counter; and on bringing this action for false imprisonment, it was held well to lie: 1. Because the act appoints the censors to fine and imprison, here it has been done by the president and censors: 2. The offence for which the party is to be committed, is *pro non bene exequendo facultate medicinæ*; here the committat is for saying that *he would practise without their permission*: so that the power of committing not being strictly pursued, the persons committing were held to be trespassers, and that the action lay.

Doctor Bonham's case.  
11 Co. 114.

## 2. "So in the case of commissioners of bankrupt."

This action was adjudged to lie against the defendants, who were commissioners of bankrupt, for committing the plaintiff (whom they suspected of secreting part of the bankrupt's effects) for not appearing on the first summons. The statute of 1 Jac. 1. c. 15. enacting, "That in such case a summons shall first go to the party to appear, and on his default, or neglect, a warrant or second summons; and if brought in on the warrant, he refuses to be examined, or on a second summons neglects to come, then, and not before, the commissioners have power to commit;" and here having been committed on the first summons, the imprisonment was contrary to law.

Dyer v. Miffing.  
2 Black. Rep.  
1035.

And this action lies against commissioners of bankrupt for any commitment not warranted by their power; as for not answering a question, which question appears to be improper; or where they do not acquiesce in a sufficient answer, but commit the party: so if the time committed for is improper.

Miller v. Seare  
& alt.  
2 Black. Rep.  
1141.

## 3. Where

### 3. Where the Court or Magistrate has Power, but the Proceedings are irregular.

*Crawley's case.*  
Cro. Jac. 567.

1. The defendant was committed by the sessions for not taking on himself the office of constable of a place of which he denied that he was an inhabitant. This commitment was adjudged unlawful, for he should *first have been indicted* for refusing to undertake the office; and if he had been found on the indictment to be an inhabitant of the place, he should have been fined, and committed only for non-payment of the fine.

*Hill v. Bateman.*  
1 Stra. 710.

So where the defendant was a justice of peace, and convicted the plaintiff for destroying the game, and though it was proved *that the plaintiff had effects sufficient to answer the conviction* if distrained, yet the defendant *sent him immediately to Bridewell*, without endeavouring to levy the penalty upon his goods. This action was held well to lie against the justice for such irregular commitment; for the statute punishes by penalty, and orders the party to be imprisoned *only in case of non-payment*; therefore the justice should first have issued his warrant to levy the penalty.

*Smith v. Gibson.*  
1 Will. 153.

So where the plaintiff was convicted in a penalty for harbouring run goods contrary to statute of Geo. 1. in a penalty of 13l. which he offered to pay, but was kept in custody *till he paid a further sum of 5s. 4d. for fees*, which could not by law be demanded: This action was adjudged to lie for such detention, when he was entitled to a discharge.

2. "So though the original arrest might be warrant-able, yet *for any subsequent oppression or cruelty*, this action lies."

*Wall v. McNamara.*  
1 Term Rep. 536.

As where the defendant was governor of *Senegambia*, and the plaintiff being an officer, from the dangerous state of his health, had quitted his post without leave; for which he was justly put into confinement; but it appearing that *circumstances of unnecessary and wanton cruelty had been practised*, as confining him for a long time in a dungeon, without the benefit of fresh air when dangerously ill; he recovered considerable damages in this action.

For other cases of arrests, *vid.* Action of Trespass on the Case, Chap. XIII.

#### 4. OF CASES REDUCIBLE TO NO CERTAIN HEAD.

*Clark's case.*  
5 Co. 64.

As, 1. The mayor and burgesses of *St. Alban's* made a rate for building a court-house, to be assessed on the inhabitants



habitants at large, and made a *bye-law thereon*, "That any one refusing to pay such rate should be imprisoned." Under this bye-law the plaintiff was taken and imprisoned, and this action was adjudged to lie for such imprisonment; for no bye-law can create such a power; it is contrary to *Magna Charta*, which declares, "That nullus liber homo capiatur aut imprisonetur nisi per iudicium parium suorum."

2. So where a person was arrested, and the person at whose suit he had been arrested ordered the sheriff to discharge him, and released him of the action, notwithstanding which the sheriff detained him, this action was adjudged to lie against the sheriff. So where there was a *superfedeas* sent to the sheriff, and the party was not discharged, this action was held to lie. *Withers v. Henley.* Cro. Jac. 379.

3. "Where any false imprisonment has been done by the influence or procurement of another, this action shall lie."

As where the defendant, who was an *East India* governor, prevailed on the *Nabob* to imprison the plaintiff: This action was adjudged to lie against him, though the actual imprisonment was by another. *Rafael v. Verrell.* 2 Black. Rep. 1055.

4. So this action lies for any injury committed in a foreign country; as in this case, against the governor of *Minorca* by an inhabitant whom he had falsely imprisoned. *Molyn v. Fabrigas.* Cowp. 161.

5. By stat. 5 H. 4. c. 20. justices of peace shall imprison no person but in the common gaol, saving the rights of lords, who have gaols in their franchises. *Quære*, If false imprisonment would not lie on this statute, if a justice of peace imprisons a person elsewhere?

## 2. WHAT ARRESTS OR DETENTIONS ARE LEGAL.

1. "The first is the case of arrests under the process of some court of justice having cognizance of the cause, which process has regularly issued." 3 Black. Com. 127.

But a distinction is to be observed in the case of officers and private persons. If the action is against the sheriff for the arrest, he shall justify sufficiently, by shewing the writ. So it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ returned, if returnable; which the bailiff need not, as it is not in his power. But if the action is against the plaintiff in the first action, or a mere stranger, they cannot justify unless they shew a judgment *judgment*

*Britton v. Cole.* Salk. 403.  
Countess of Rutland's case, 6 Co. 52.

## FALSE IMPRISONMENT.

*judgment as well as execution ; for the judgment might have been reversed.*

3 Black. Com.  
127.

2. " A second good justification under a legal arrest is, if made by an officer, having authority to arrest, or under such officer's or magistrate's warrant under hand and seal, and expressing the cause of the commitment."

Samuel v. Payne  
Doug. 345.

1. A peace officer can justify an arrest on a charge of felony, though he has no warrant against the person charged, and though it should afterwards appear that no felony had been committed; but in such case a private person could not justify, for a peace officer is bound to take into custody a person charged with a felony, and bring him before a magistrate; and it would be mischievous if the officer was first to try and exercise his judgment at his peril.

But if a felony has been actually committed, a constable or even a private person may justify an arrest, if it is made without malice, and in pursuit of the offender upon fair and reasonable grounds of suspicion.

2 Inst. 46.

2. But " where the arrest is by warrant, it must appear that the warrant was legal; that is, issued in a case of which the magistrate had cognizance; for if not, the warrant shall not justify the officer acting under it."

Shergold v. Hol-  
loway.  
2 Stra. 1002.

As where a justice of peace issued his warrant to the defendant to arrest the plaintiff, on a complaint for non-payment of servants wages, and the defendant did arrest the plaintiff; this action was adjudged to lie against him, for a justice of peace has no such power to grant such a warrant to apprehend the party complained of; he can only issue a summons: it was therefore an illegal warrant, and no justification to the defendant.

Masters v.  
Butcher.  
1 Ld. Raym.  
740.

So an officer cannot justify an arrest and imprisonment for non-payment of taxes, under the general printed warrant which such collectors have signed by two justices: but he ought to have a special warrant.

Anon.  
Moor 740.

3. So a magistrate may commit for any contempt shewn him, but it must be while in execution of his office. Therefore where in this action the defendant justified that he being mayor of the corporation of W. the plaintiff said, " He was a fool;" wherefore he committed him. It was held ill, for not shewing that he was in his seat or exercising his office.

3 Black. Com.  
127.  
Foster's Crown  
Law.

3. A third good cause of arrest is such as is warranted by the necessity of the thing: as arresting a felon by a private person, impressing sailors in the time of war; apprehending

prehending waggoners for offences on misbehaviour on the highway, and such like causes.

4. *Secretaries of State* may commit for suspicion of treason, as conservators of the peace did at common law; and it is incident to their office: And a commitment to a messenger is good. *Rex v. Kendal & Roe.* 1 Salk. 347.

But they have no power to issue a *general warrant* to arrest the person, or seize the papers on a general information. *Entick v. Carrington.* 2 Willf. 275.

5. "*Commanding officers in the service of the army or navy* have a power of putting their inferior officers under an arrest; but it must be done on good grounds, and not oppressively."

As where the defendant was captain of the *Trident* man of war, and put the plaintiff, who was the purser, into confinement; he kept him there for three days, after which he liberated him, without any charge or court-martial. The plaintiff recovered for the imprisonment. *Swinton v. Molloy.* Term Rep. 537.

6. False imprisonment will not lie for the taking and detaining the mariners of a ship, which has been captured *as a prize*, though the Court of Admiralty afterwards find her not to be a lawful prize. For the Court of Admiralty possesses an exclusive jurisdiction not of prize only, but of every matter dependent on it, which this is, as the mariners must be brought in with the vessel; and that court can give damages for the injury and detention to the individuals who are injured. *Le Caux v. Eden.* Douglas 592.

#### 4. OF THE PLEADINGS AND EVIDENCE.

##### 1. OF THE PLEADINGS AND EVIDENCE ON THE PART OF THE PLAINTIFF.

I find no cases of consequence to this head, except the following, viz. 1. "That no new matter foreign to the issue is admissible in evidence, under the general replication of *de injuria sua propria*, of any fact which is not contained in the plea; for these alone are traversed by the replication."

For where to an action of false imprisonment, the defendant pleaded a justification of the arresting the plaintiff, under an information for treasonable practices, made to him as secretary of state, for which offence he had been admitted to bail by the chief justice of the *King's Bench*. The plaintiff replied the general replication of *de injuria sua propria absq. tali causa*. It was adjudged, that under this replication, *Sayre v. Lord Rochford.* 2 Black. Rep. 1155.

replication, that the plaintiff could not give in evidence a tender and refusal of bail, for it was not contained in the issue.

Hillyfield v.  
Stanyford.

Mic. 25 Car. 2.

Buller N. P. 23.

2. The defendant in this case justified, that he had arrested the plaintiff by a *latitat* for 20l. which he owed him; the plaintiff replied, and traversed that he owed so much money, and a repleader was awarded; for the debt is but inducement, which should not be traversed.

3. "Where the writ or process is but inducement to the action, in which case *its tenor* need not be set out; but the *substance* merely a variance in point of form, though not in substance, shall not be held fatal."

Wilson v. Maw-  
son.

Sittings Mic. 13

Geo. 2. quot.

1 Term Rep.

237.

As where in an action of false imprisonment, the bill of *Middlesex*, on which the party had been arrested, was set out in the declaration as follows: "The sheriff is commanded to take *A. B.* (the then defendant) and *John Doe*, if, &c. and them, &c. so that he have their bodies before our Lord the King at *Westminster*, on, &c. (*verbatim* to the end): the bill of *Middlesex* being read, was in these words: "The sheriff is commanded to take *A. B.* and *John Doe*, if they shall be found in his bailiwick, and them safely to keep, so that he have their bodies," &c. It was insisted that this was a variance between the bill of *Middlesex* and the record; but *Ch. Just. Lee* held, That the bill of *Middlesex* need not have been set out, that the substance was sufficient, and therefore the evidence was sufficient, as there was no variance between the bill of *Middlesex* and so much as was set out in the record.

## 2. OF THE PLEADINGS AND EVIDENCE ON THE PART OF THE DEFENDANT.

Smith v. Bou-  
ches.

2 Stra. 993.

2 Ref.

Philips v. Biron.

1 Stra. 509.

2 Ref.

1. Where this action is brought jointly against the plaintiff in the former action and the officer, they may sever in their defence, for the writ would be a good justification to the officer; but if the officer joins the plaintiff in the same plea, he waives the benefit he may have himself; and if the plea is bad as a justification for the other, judgment shall also go against him.

Middleton v.  
Price.

2 Wilk. 17.

And so if they join in the plea, and it is bad for the officer, it shall be so likewise for the other party; as here, where he did not shew the process returned, under which he justified.

2. "Where the defendant justifies under process of a court of limited jurisdiction, the plea should shew that the cause was properly subject to such jurisdiction."

As where in this action the defendant justified, under a prescription in the *Marshalsea court to hold plea of all causes within the verge*, and under a *capias* returnable at the next court, under which the plaintiff had been arrested. This action was held to lie for such arrest, for reason that the process was ill awarded, and the arrest unlawful: 1. Because it did not appear that the *parties to the action were of the household*, between whom only the court has jurisdiction: 2. Because the process was *not returnable on a day certain*, but at the next court. Johns v. Smith, Cro. Jac. 314.

So where the defendant justified, under an order of a court of record in *London*; as a serjeant at mace, to arrest the plaintiff, *pro quodam contemptu*, for not paying 20s. to B. G. which he owed him. On demurrer the plea was held to be bad, for to imprison a man *pro quodam contemptu*, is too general, and by this plea it does not appear that the court had jurisdiction; and the officer is only to obey the order of the court in matters of which it hath jurisdiction. Dye v. Olive, March 117.

2. "Where the defendant justifies in like manner, under process of an inferior court, and a special authority to imprison, the plea should shew that *that authority was strictly pursued*."

For where, in trespass and false imprisonment, the defendant justified under an order of the *Court of Conscience in London*, directed to him to arrest the plaintiff, and carry him to the Counter, and imprison him till he paid 9s. 6d. *virtute cujus*, he took him and detained him. On demurrer, the plea was adjudged to be bad; for the order was, to imprison him in the Counter, which his plea should have shewn that he had done, as he confesses he took and detained him. Swinstead v. Lyddal, Salk. 408.

But where the defendant justifies under a process of the inferior court, it is sufficient for the defendant to alledge in his plea that a plaint was levied, and process had in the inferior court, and that *superinde taliter fuit processum*, and a *capias* awarded, without setting out all the proceedings of the inferior court at length. Adams v. Freeman, Sayers Rep. 81.

3. Where an officer, or other person, justifies under process, which is returnable, he must in his plea shew that it was returned, or the plea will be bad. Middleton v. Price, 1 Will. 17, 2 Stra. 1184.

And Note, "That this action being in its nature transitory, the place laid in the declaration is not traversable, except the justification extends only to a particular place." Co. Litt. 282.

Smith v. Hel-  
lier.  
Geo. Eliz. 167.

As where, to false imprisonment in *Middlesex*, the defendant justified that *Lynne* was an ancient village, and that it *usitatum fuit* to chuse a mayor annually, who was keeper of the gaol, and that the plaintiff was committed to gaol on a plaint entered in the court there, *absque hoc* that he was guilty in *Middlesex*. The justification being local, the traverse was held to be good.

4. The *statute of limitations* is a good plea in this action:

1. As to which it is enacted by stat. 21 *Jac. c. 16*. "That all actions for assault and battery, or false imprisonment, shall be brought within *four years* after the offence committed, or they shall be barred."

Coventry v. Ap-  
pley.  
Saik 420.

If the imprisonment is laid for a continued length of time, as here from 32 *Car. 2.* till the 3d of *April, 4 Jac. 2.* the defendant may divide the time, and plead the statute of limitations as to part, and not guilty or any other plea to the rest; and in such case the plaintiff should not demur, but plead that the duress was continued.

2. "In the case of *justices of the peace*, or *constables* acting under their warrants, another limitation is made by stat. 24 *Geo. 2. c. 44.* which enacts, That actions against them shall be commenced within *six months* after the offence committed, or the plaintiff shall be barred."

Pickersgill v.  
Palmer.  
Trin. 1 Geo. 3.  
C. B.  
Buller N. P. 24.

If a man be imprisoned by a justice's warrant the first day of *January*, and kept in prison till the first day of *February*, if the action is commenced within six months after the first day of *February*, it will be commenced in time; for the whole imprisonment is one entire trespass.

5. With respect to officers acting in virtue of their office, special provision is made as to pleading by them to this effect: By stat. 21 *Jac. 1. c. 12.* it is enacted, "That justices of the peace, mayors, bailiffs, churchwardens, and overseers of the poor, constables, and other peace-officers, may plead the general issue, and give the special matter in evidence. Likewise, that any action brought against them shall be laid in the proper county; and if upon not guilty pleaded, it shall appear that the fact was done in another county, the jury shall find the defendant not guilty."

And by statute 24 *Geo. 2. c. 44.* it is further enacted, "That no writ shall be sued out against a justice of peace for what he shall do in execution of his office, till notice in writing of such intended writ shall be delivered to him, or left at his place of usual abode, at least a month before, and the justice may tender amends; and in case the same is not accepted, he may plead such tender in bar of the action,

" action, together with the plea of not guilty, and any  
 " other plea, by leave of the court; and if upon issue  
 " joined the jury shall think the amends so tendered suf-  
 " ficient, they shall find a verdict for the defendant. -

2. " No action shall be brought against any constable,  
 " or any other person acting by his order for any thing  
 " done in obedience of a justice's warrant, *until demand*  
 " *made of the perusal and copy of such warrant*, and the  
 " same has been refused for the space of six days; and in case  
 " the warrant has been shewn, and a copy taken, and  
 " afterwards an action brought against the constable, with-  
 " out making the justice a defendant, the jury shall, on pro-  
 " ducing the warrant, find a verdict for the defendant,  
 " notwithstanding any defect of jurisdiction in the jus-  
 " tice.

" And if the action be brought jointly against the con-  
 " stable and the justice, upon producing the warrant, the  
 " jury shall in like manner find for the constable.

" And if the jury find against the justice, the plaintiff  
 " shall recover from *him* the costs he has to pay the con-  
 " stable; with a proviso, that if the judge certifies that the  
 " injury was wilfully and maliciously committed, the  
 " plaintiff shall be intitled to *double costs*."

The several constructions on this statute are :

#### I. AS TO JUSTICES OF PEACE.

1. If the justice pleads tender of amends under this stat. Lawrence v. 24 Geo. 2. the plaintiff may have a rule for the defendant to Cox. Hill. 33 G. 2. bring the money into court, for the plaintiff to take the same, B. R. Buller N. P. 24. on his discontinuing the action.

2. Though the justice has omitted to tender amends, yet Casbourn v. Ball 2 Black. Rep. 859. he may have a rule to pay a sum of money into court as amends; but it must appear before this is allowed, that the action is brought against the justice, *for something done as a justice in the execution of his office*. In this case the motion was to that effect, and the court granted a week's time to plead; in which time it appeared from the plaintiff's notice of action, that the defendant was sued as a justice of peace, the court made the rule absolute as above.

3. If the action is brought for an illegal commitment, Hill v. Bateman. 1 Str. 719. 2 Ref. or any other unlawful act against the justice of peace, he is obliged to shew the regularity of his proceedings, and the information, &c. laid before him, upon which his pro-  
 Z 2 ceedings

ceedings or convictions were founded, must be produced and proved in court.

Entick v. Carrington.  
2 Wils. 275.

4. *A secretary of state* is not a justice of peace, nor his messengers constables, within the stat. 24 G. 2.

## 2. AS TO INFERIOR OFFICERS.

1. "The privileges given to constables and inferior officers, under these acts, are confined to cases in which they are acting in execution of their offices."

Anon.  
1 Stra. 446:

For where the constable and another quarrelled, and the constable beat the other, this happened at *Dover*, and the action was brought in *Middlesex*, when the constable insisted the action should be brought in the proper county, by stat. 21 Jac.; but the objection was over-ruled, for that statute is confined to cases in which the constable is acting in execution of his office, and this was a private quarrel.

Money v. Leach  
3 Burr 1742.

2. The protection afforded to the constable or inferior officer under the statute, is only while acting in obedience to the justice's warrant; therefore the defendant must always shew that he did so act: and where the justice cannot be liable, the officer is not within the protection of the act; therefore it is no justification, if directed to him to take up one person, and he takes up another; for such is not in obedience of his warrant.

Nutting v.  
Jackson.  
Pasc. 13 Geo. 3.  
B. R.  
Buller N. P.  
24.

3. An overseer of the poor, who distrains for a poor's rate, under a justice's warrant, is an officer, within the protection of the act.

4. "The act only extends to actions brought against officers for torts committed by them in the execution of their office, not for actions of another nature."

Fekham v.  
Terry.  
Pasc. 13 Geo. 3.  
B. R.  
Buller N. P. 24.

For where the action was *assumpsit* for money had and received, to recover back from the officer the money levied by him on a conviction which had been quashed, it was adjudged, That a demand of the copy of the warrant under the statute was not necessary.

## 4. OF THE VERDICT AND DAMAGES.

1. "The jury can only give damages in this action to the time of the action brought."

Donsfield v. Lee  
1 Lord Raym.  
329.

For where it was for false imprisonment for four months, from the 1st of October, and damages entire, and the declaration was of Michaelmas term, and so damages were given



given for part of the time after the action commenced ; judgment was arrested.

But where the imprisonment was so laid, *viz.* for twenty-five weeks, from the 18th of *October*, and the declaration was of *Michaelmas* term, and verdict for the plaintiff ; it was moved in arrest of judgment, That the action was brought too soon, and it appeared that damages had been given for an imprisonment long after the action had been depending : but it was resolved that the *continuando* being laid under a *sciz.* would not vitiate what was properly laid in point of time, and the plaintiff had judgment. Webb v. Turner  
2 Stra. 1095.

2. How far (when this action is brought jointly) the jury may sever in the damages, *vid. ch. Trespass*, under the head *Verdict*, the cases there applying here.

By statute 5 *Geo.* 13. all writs of error wherein there shall be a variance from the original record, or other defect, shall be amended.

Therefore, where an action of false imprisonment was brought against *Verelst* and *Smith*, but *Verelst* only was found guilty : by mistake, a writ of error was brought in the name of *both*, and the court allowed it to be amended, by striking out the name of the defendant below, who had been acquitted. Verelst & Smith  
v. Rafael.  
Cowp. 425.

For costs to the defendant, *vid. Action of Assault*, the law being the same.

## CHAPTER VI.

## The Action of Adultery.

THE ground of this action is the injury done to the husband, by alienating the affections of his wife, destroying the comforts arising from her company and that of her children, and imposing on him a spurious issue.

The principal matters to be considered in this action are,

1. The evidence necessary to maintain it: 2. The damages:
3. The pleadings and costs.

## I. OF THE EVIDENCE.

1. "Plaintiff must bring proof of the *actual solemnization of a marriage*; nothing shall supply its place: cohabitation or reputation are not sufficient, nor any collateral proof whatever."

Morris v.  
Miller.  
4 Burr. 2057.

As where the plaintiff, in this case, proved articles made after marriage with his wife, for the settling of the wife's estate, with the privity of the relations on both sides, cohabitation, name, and reputation; he proved further, that the defendant, on being asked where Mrs. Morris was? answered, In the next room: she being there with him. So that he confessed that he had committed adultery with the plaintiff's wife, which it was contended was an admission of the marriage; but it appearing that the marriage had in fact been celebrated in *Mayfair* chapel, but the register or book could not be admitted in evidence (stat. 26 Geo. 2. c. 3. § 14.) the minister who had married them having been transported, and the clerk being dead; for want of proof of an actual marriage, the plaintiff was nonsuited.

But proof of the marriage, either by a copy of the register of the church where the ceremony was performed,  
or

or by the testimony of one who was present at the ceremony, will be sufficient.

And the copy of the register is of itself sufficient evidence of the marriage, *without proving the identity of the parties*; for marriage-registers are as records. Birt v. Barlow. Doug. 162.

In an action for *crim. con.* the marriage was proved by a person who was present when it was solemnized in the Fleet in the year 1737, and the plaintiff's counsel offered to give in evidence the Fleet register, as a confirmation of the testimony. *Chief Justice De Grey* refused the evidence, and said, The ground of rejecting the evidence was that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit. Howard v. Burtonwood. C. B. Sittings West. Trin. 1776. MSS.

But it is not necessary to prove a marriage according to the ceremony of the church of England: It is sufficient if the plaintiff is of any religious sect, to prove a marriage according to the rites and ceremonies of that sect; as *Jews, Quakers, &c.* Woolston v. Scot. Per Dennison, Justice at Thetford, 1753. Buller N. P. 28.

2. The confession of the wife will be no proof against the defendant; but a discourse between her and the defendant may be proved: so letters written to her by the defendant may be read as evidence against him, though her letters to him will be no evidence for him. Baker v. Morley Guildhall, 1739. Buller N. P. 28.

## 2. OF THE DAMAGES.

1. The injury in the case of adultery being great, the damages are generally considerable; but they depend upon circumstances; that is, they are increased or diminished from the consideration of the rank and quality of the plaintiff: so from the peculiar turpitude of the case, as if the defendant was the friend, relation, or dependant of the plaintiff: so if it appeared that the plaintiff and his wife lived happily before that transaction and acquaintance with the defendant: so that the wife had always borne a good character till then: so that there was a settlement and provision for the children of the marriage: all these go in aggravation of the damages, in which also the circumstances and property of the defendant are always considered. Buller N. P. 27.

2. On the other hand, many circumstances go in extenuation of the offence, and mitigation of damages: as if it appears that the plaintiff encouraged the defendant's addresses to his wife, or connived at it. Buller N. P. 27.

As

Sir R. Worsley  
v. Bisset.  
Sittings after  
Hill, 1782.

As in this case, where it appearing that this was the case from many circumstances; one in particular, from his shewing his wife naked when going into a bath, to the defendant: the plaintiff, though a man of rank, obtained but one shilling damages.

6. C.

So the defendant may give in evidence that the plaintiff's wife had been criminal with others.

Buller N. P. 27.  
Cibber v. Sloper  
Per Lee, *ibid*.

So it may be proved that she eloped before; or that the husband turned her out of doors, and refused to maintain her, and that he kept company with other women; or that he consented to the defendant's familiarity with her: all these are proper evidence in mitigation of damages.

Roberts v.  
Marlston, at  
Hereford, 1756.  
Per Willes,  
C. J.  
Rigby v. Ste-  
phenfon, at Staf-  
ford, 1745.  
Per Foster, Just.  
Buller N. P. 27.

So the defendant may give in evidence that the wife had a bastard before marriage: but he will not be permitted to give evidence of the general reputation of her being a prostitute, or having been so; for that may have been occasioned by her familiarity with the defendant himself: though perhaps, after having proved her criminality with other men, it may be admitted to go into evidence of her general character.

Smith v. All-  
fon.  
Per Lord Man-  
field, Sittings  
after Tr. 5 G. 3.  
Buller N. P. 27.

3. In this case, it was laid down by Lord *Mansfield* as clear law, That if a woman is suffered by her husband to live as a prostitute, and a man is thereby drawn into *crim. con.* that no action will lie at the suit of the husband; for it is a damage without an injury: but if the wife lives in such a state of prostitution without the privity of the husband, it will not bar the action, be she ever so profligate, but only go to the damages. *Pratt, C. J.* declared himself of this opinion about the same time.

Buller N. P. 27.  
Cibber v. Sloper,  
ante.

Contra per  
Lord Kenyon.  
4 Term Rep.  
651.

It is said indeed, in this case, that though the husband's privity and consent to the defendant's familiarity and connection with his wife was clearly proved, yet that the action was held to lie: but the distinction between this case and that before laid down by Lord *Mansfield*, is easily settled; the doctrine laid down by his lordship being of an indiscriminate prostitution; this only of a criminal connection with one person.

### 3. OF THE PLEADINGS AND COSTS.

The declaration in this case states the offence, by making an assault on the wife, &c. &c.

On this two cases have occurred:

1. As to Pleadings: 2. As to Costs.

In actions of assault the time of limitation is four years: *Cooke v. Sayer*.  
 but in this action the gist of the action being the criminal *Mic. 23 Geo. 2.*  
 conversation and not the assault, not guilty within *six years* is *B. R.*  
 the proper plea under the statute of limitations; it being de- *Buller N. P. 28.*  
 clared on as case for the criminal conversation. *2 Burr. 753.*  
*S. C.*

## 2. As to Costs.

This action is not considered so far an action of assault, *Batchelor v.*  
 that in case the plaintiff has a verdict with damages under forty *Bigg.*  
 shillings, that he shall lose his costs; for the special injury *3 Will. 319.*  
 being the ground of action, he shall have full costs, though *2 Black. Rep.*  
 the damages are under forty shillings. *855.*

And note, This action being founded on a tort, the court *Duberly v.*  
 refused to grant a new trial in this case, on the ground of ex-  
 cessive damages, though it appeared that the husband had been *Gunning.*  
 grossly culpable, even so far as would have justified a verdict *4 Term. Rep.*  
 for the defendant. The damages were 5000*l.* *651.*

## CHAPTER VII.

## The Action of Replevin.

**R**EPLEVIN is a remedy grounded on a distress, being a re-deliverance to the first possessor of the thing distrained, on security given by him to try the right, and to re-deliver the distress if judgment be against him.

In treating of this action, I shall, first, consider the *proceedings* by which replevin is made: 2dly, The *pleadings*; under which I shall consider, 1. The nature of the action, with reference to the *things* for which it lies: 2. With reference to the *person*: 3. The *judgment, costs, and damages*.

## I. OF THE PROCEEDINGS IN REPLEVIN.

**Co. Litt. 145.b.** These proceedings are either by common law or by statute; that is, by *writ* or by *plaint*.

**2 Inst. 14c.** 1. The proceedings at common law were by *writ issuing out of Chancery*, commanding the sheriff to cause the goods taken to be re-delivered to the owner. Under this writ the sheriff might act *judicially*, and *inquire in his own court* whether the caption was just or not, and give judgment accordingly; and this was for the speedy determination of those causes in which the people might want their cattle.

But still there was an inconvenience in applying *Chancery* for the writ, on account of the distance and delay. This was remedied by the statute of *Marlbridge*, 32 H. 3 c. 21. which orders, "that the *sheriff* on complaint made shall re-deliver the beasts taken."

This is the statute mode of replevin by *plaint*, founded on the sheriff's precept to re-deliver the beast distrained, grounded on the party's complaint. And

the still further convenience of the people, it is ordered by statute 1 & 2 Ph. & M. c. 11. "That within two months after he receives his patent, or at his next county court, that the sheriff shall depute four persons, dwelling at least twelve miles from each other, to issue replevins; and the statute gives a penalty of 5l. per month for every month he neglects."

The sheriff, under this act, may issue his replevin at any time; for it would be inconvenient to make the parties wait till the county-court day. Co. Litt. 145. b.

2. The sheriff may, on complaint made, order his bailiff to make replevin, either by his precept directed to him, or by word. But in such case, if done in the interval between the times of holding the county-courts, he must enter the plaint at the next court. Hale's F. N. B. 169. 2 Inst. 139.

But before the actual issuing of the sheriff's precept to replevy, the party replevying is bound to find *plegiū de retorno habendo*. The reason of which was, that as the common law replevin was by original writ, the plaintiff only gave the nominal *plegiū de prosequendo*; the consequence of which was, that it often happened that after the plaintiff had got possession of his goods or beasts which had been distrained, that he sold them; and though the defendant might afterward have judgment *de retorno habendo*, that they were not forthcoming. This was remedied by statute of West. 2. cap. 2. which ordered, "That the party, on suing out his replevin, should find pledges *de retorno habendo*: and if the pledges were insufficient, that the sheriff should answer."

1. Under this statute therefore, the sheriff, whether the replevin is by writ or plaint, before he grants the one, or executes the other, must take pledges as well *de prosequendo* as *de retorno habendo*. Dorington v. Edwin. 2 Show. 420.

2. The *plegiū de retorno habendo* may be by bond, and that too of the plaintiff in replevin himself, the condition of which should be, not only that the plaintiff would prosecute the suit, but also that he would make return of the beasts, if so adjudged in law, and also save harmless the sheriff for their delivery. Dalt. 440.

3. But the sheriff cannot take money or cattle as a pawn or security, in the nature of pledges *de retorno habendo*; for the process to bring the pledges into court is by *scire facias*, new cause, &c. and so to have money or goods, as pledges would be an absurdity. Moyser v. Gray. Cro. Car. 322.

Richards v.  
Aton.  
2 Black Rep.  
1220.

4. If insufficient pledges *de retorno habendo* are taken, the sheriff, the under-sheriff, and the replevin-clerk (that is, the officer appointed to make replevins, under stat. 1 & 2 P. & M.) are all liable to the defendant, who has judgment *de retorno habendo*.

Dorrington v.  
Edwin.  
3 Mod. 36.

If the proceedings are by plaint, and removed by *certiorari*, and the defendant has judgment, he may have a *scire facias* against the pledges.

Prowse v.  
Pattison.  
Hil. 13 G. 2.  
Bull. N. P. 60.

But he may have his *action on the case* against the sheriff if the pledges are insufficient, without any previous *scire facias* against them.

Though he has a more summary mode by motion, as was the case of *Richards v. Aton, supra*.

Saunders v.  
Darling.  
Sittings Trin.  
10 G. 3. C. B.  
Bull. N. P. 60.

In the proceedings against the sheriff, some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight proof is sufficient to throw the proof on the sheriff: for the sureties are known to him, and he is to take care that they are sufficient; as if he does not produce or name them, it is sufficient to charge him. *Richards v. Aton, supra*.

5. Besides those pledges which are discretionary in the sheriff, he is ordered by stat. 11 Geo. 2. c. 19. "To take a bond with two sureties, in a sum double the value of the goods distrained, conditioned to prosecute the suit and to return the goods if a return is awarded; which bond may be assigned to the defendant; and if forfeited, may be sued in the name of the assignee."

Rex v. Lewis.  
2 Term Rep.  
617.

But if the sheriff neglects to take a replevin-bond, the court will not grant an attachment against him, but leave the party to his action against the sheriff.

Yea v.  
Lethbridge.  
4 Term Rep.  
433.

And where an action is so brought against the sheriff for taking insufficient pledges, the *sum recovered shall be only in the amount of the distress*, not to the sum which might have been recovered against the plaintiff in *replevin*, for as, if he had taken a bond to return the things distrained, and as the condition of this bond would be satisfied by returning the goods themselves, he cannot be liable beyond their value.

Hale's F. N. B.  
168.  
2 Inst. 139, 140.

3. When, therefore, the sheriff has taken these steps, he must then issue his precept, directed to his bailiff, to make replevin, and cause the goods to be delivered to the plaintiff.



And, by stat. of *Marlbridge*, "If the replevin is to be made within a liberty in the county, the sheriff shall make his precept to the bailiff of the liberty, to make deliverance; and if he neglects or makes no answer, the sheriff shall without further notice, do it himself."

And, by the same statute, "If the distress had been made in the county at large, but impounded within the liberty, the sheriff might, without any previous warrant to the bailiff, enter the liberty and make the replevin;" for the caption, which is the thing complained of, was in the county at large.

And by stat. *West. 1. 3 Ed. 1. c. 17.* "If the distress had been driven into any strong-hold, the sheriff, after demand, might break open doors to make replevin."

4. When the sheriff has therefore given possession of his goods to the plaintiff, if the replevin has been by *plaint*, the defendant has a day given to him in court to appear. If the replevin has been by writ *alias* or *pluries*, there no day is given, for the plaintiff has possession of his own goods, and as the defendant is supposed to have a demand against him for which he distrained, it is his business to make the plaintiff declare: for which purpose he may at any time have a rule of court to compel the plaintiff to declare. So the plaintiff may of his own accord come into court and declare, after which the defendant is by attachment brought into court to plead.

Dalt. 438.  
Hale's F. N. B. 169.

Cawen v. Ludlow.  
Roll. Ab. 581.  
Dalt. 440.

5. But as it often might happen that the sheriff might be partial or negligent, or the matter might be of considerable consequence, in such case the replevin may be removed into the courts above.

This is by writ of *pone* or *recordari*, the difference of which is, that the *pone* lies where the proceedings in the county court have been by *writ*; but the *recordari* where they have been by *plaint*: which proceedings, the sheriff is ordered by the writ to record and certify them to the court above.

2 Inst. 139.

The plaintiff may sue out either writ *without any cause shown*, because it is his own delay; but the defendant must *assign a cause*. And these are good ones: That either party is related to the lord or sheriff; that they are interested, &c. And by stat. *West. 2. c. 2.* "If the distress had been made for customs or services, and the plaintiff pretends to be out of the fee, this was good cause to remove the cause to try the tenure."

## 2. OF THE PLEADINGS IN REPLEVIN.

When therefore the plaintiff is brought into court, or comes voluntarily, the first step is to declare.—I shall therefore, first, consider the

## DECLARATION.

1. The writ of replevin complains of two things; 1st, The unlawful *taking*: 2dly, The unjust *detention*. In the declaration it is therefore to be observed,

Petree v. Duke.  
Lutw. 1150.  
Hale's, F. N. B.  
169.

1. That if the sheriff has to the writ returned *replegiari feci*; there the replevin goes only for damages for the caption, and the declaration is in the *detinuit*: but if the sheriff has not made the return of *replegiari feci*, there the declaration must be in *detinet*, for the plaintiff in the latter case has not possession of his goods or cattle; and he shall in this case recover as well the value of his goods, as damages for their unjust detention.

Moore v.  
Clipsam.  
Stile 71.

2. "The declaration should be certain in setting out the number and kind of cattle or goods distrained;" for otherwise the sheriff would not know how to make deliverance, if it should be necessary: Though this fault might be cured by the avowry, both parties agreeing on the number and nature of the things taken.

Bull. N. P. 53.

But in such case the sheriff may require the defendant to *shew him the goods*. And it would be a good return to say, *nullus venit ex parte defendantis ad ostendendum bona catalla*.

Kempster v.  
Nelson.  
Gilb. Rep. 233.

On this ground a declaration in *trover de una parcella linteii*, was held ill for the uncertainty of the description.

Brown v.  
Mattaire.  
2 Stra. 1015.

But a declaration for fourteen skimmers and ladles was held to be good.

Read v. Hawke.  
Hob. 16.

3. It is not sufficient for the plaintiff to state generally in his declaration the taking in such a vill or place generally for a venue; but he must particularly set it out "*as a certain place called*," &c. for by alledging the vill generally perhaps the defendant might have a right of freehold there himself, but by mentioning the particular place in the count, it shews the defendant to what to make title. But this should be taken advantage of by special demurrer. For if the defendant does not demur, but pleads *cepit*

Ward v. Laville.  
Cro. Eliz. 896.

*cepit*, the count shall stand; for if there was no taking, the place is immaterial.

But where the defendant so pleads *non cepit*, the plaintiff must prove the taking *at the place mentioned in the declaration*; for as the defendant on this issue does not insist upon a return, but denies the taking, the place is material to ascertain the fact as laid.

*Johnson v. Wollmer.*  
1 Stra. 507.

4. The plaintiff may declare for several takings, and at several places; part at one time or place, and part at another: And if the plaintiff alleges two places, and the defendant answers only to one, that is, if the plea begins as an answer to the whole, which in fact is but an answer to a part, it is a discontinuance, and the plaintiff must not demur, but take his judgment for that by *nihil dicit*; for if he demurs or pleads over, the whole action is discontinued.

*Hale's, F. N. B.*  
168.  
Bull. N. P. 54.  
*Weeks v. Speed.*  
Salk. 94.  
Ib. Salk. 179.

## 2. OF THE PLEAS BY THE DEFENDANT.

Pleas by the defendant are either in abatement or in bar.

### I. PLEAS IN ABATEMENT

Are either such as *of themselves* induce a return, or such as require a *conusance* or claim.

As, first, If the defendant pleads "*that the goods are the property of himself, or of a stranger*," this plea neither denies, confesses, or avoids the caption, but shews that the plaintiff not having any property in the goods, has no right to have them delivered to him; that therefore the writ should be quashed, and he (defendant) have a return of the goods.

*Wildman v. North.*  
2 Lev. 92.

Therefore in pleading such matter the defendant need make no claim or suggestion to entitle him to a return, because he had possession of the goods before the replevin, of which he was deprived by the plaintiff, who had no right.

*Butcher v. Porter.*  
Salk. 94.

### 2. As to the second case,

If the defendant pleads "*that the goods were the property of the plaintiff and another person*," as this plea only is to the form of the writ (the plaintiff alone not having property) the defendant must add a *conusance* or claim to entitle him to a return.

Co. Litt. 145.

Foot's case.  
Salk. 93.

So if the plaintiff declares of a taking *in one place*, and the defendant pleads that he took the goods *at another*, in this case he must make consuance or avow for a return; for such plea does not disaffirm property in the plaintiff; and the defendant must shew a right either of possession or property to have a return.

Watts v.  
Hagden.  
Cro. Eliz. 372.

And in such case the plaintiff ought not to traverse the matter of the consuance; if he does, and demurrer be joined on it; it is a discontinuance, and the defendant shall have judgment on it. He should only reply to the place traversed; for to reply to the consuance would be to plead double.

Co. Litt. 145. b.

For note, That it is a general rule that the plaintiff must have the property of the goods in him at the time of the taking, or he cannot maintain replevin; but a special property will be sufficient to maintain the action. Therefore if the defendant claims property in the cattle or goods, the sheriff cannot make replevin, for that might be to give the goods to a person who had no right to them. This is where the replevin is by plaint; and in such case the plaintiff may have a writ *de proprietate probanda* directed to the sheriff, who is by an inquest to inquire into the property, and if it be found for the plaintiff, he must make deliverance; but if for the defendant, he can proceed no further. But if the replevin has been by writ, if the defendant claims property, the sheriff *should make his return to that effect*, and the suit shall go on in the *Common Pleas*, where the property shall be finally tried. It is in this stage the pleas beforementioned come into question.

Id.

2dly, Pleas in bar are the following:

1. The general issue: 2. The statute of limitation: 3. A justification: 4. The avowry or consuance. And,

#### I. OF THE GENERAL ISSUE.

Ero. Rep 5.

The general issue in replevin is *non cepit*; and this plea confines the issue to the *taking*, for it allows the property to be in the plaintiff; and therefore that being admitted by the plea, no evidence shall be admitted to disprove it.

1 Stra. 507.  
Bull. N. P. 54.

2. If the defendant pleads *non cepit*, if he does not insist on a return, he may prove the taking to be at a place different from that laid in the declaration, and it shall be good.

This is, provided the defendant never had the cattle in the place mentioned in the declaration at all; for if the plaintiff

plaintiff can prove that the defendant had them in the place laid, he will have a verdict; though if the fact is, that the defendant took the cattle at another place, and only had them in the place mentioned in the declaration, in the way to pound, he ought to shew that matter specially.

2. OF THE PLEA OF THE STATUTE OF LIMITATIONS.

2. It is enacted, by stat. 21. *Jac.* 1. c. 16. "That actions of replevin must be brought within *six years* after the cause of action accrued; so that the statute of limitations is a good plea in bar."

3. OF THE PLEA OF JUSTIFICATION.

"A plea in justification admits the caption, but denies the injustice of it."

1. As is the plea *claiming property, either in the defendant himself or in a stranger*, which, before it was shewn, might be pleaded in abatement: but it may also be pleaded in bar, as it destroys all right of action in the plaintiff: for if the property is in the defendant himself, it is clear; and if it is in a stranger, the defendant is intitled to hold the goods against all persons but the stranger himself, and therefore has a right to a return. Presgrave v. Saunders.  
Salk. 5.  
Wildman v. North.  
2. Lev. 98.

Therefore, where the defendant pleaded, That at the time of the taking, the property was in Lord North, not in the plaintiff, he was held to be intitled to a return. Sir Nicholas Bacon's case.  
Cro. Eliz. 754.

2. A distinction is to be observed between an avowry and a justification.

*An avowry always goes for a return*, and therefore shews a subsisting right at the time of the avowry, as made for rent, *ut gr.*: but *a plea in justification does not always go for a return*. As, for example, where the original taking was lawful, but not so at the time of the plea pleaded. Buller N. P. 55.  
Danv. Ab. 652.

As where the lord distrained for homage, the tenant died, and then his executors brought replevin, the lord should justify the caption, because it was lawful when made; but it not being lawful to detain the goods after the tenant's death, he therefore could not *avow*; for he was not intitled to a return, though he was exempt from damages. Roll Abr. 319.

4. OF THE AVOWRY.

An avowry is an acknowledgment by the defendant of the taking of the beasts or goods, and setting forth the cause

cause of taking them, for the purpose of having a return.

If the defendant was not acting in his own right, but as bailiff to another, he is not said to *avow*, but to make *cognizance*.

Under this head, I shall consider, 1. The form, or how the avowry is made: 2. The avowry considered with reference to the things for which it lies, which includes, 1st, For what good causes it may be made. 2dly, For what it cannot be made. 3dly, Of the avowry with reference to the persons making it.

#### I. HOW THE AVOWRY IS TO BE MADE.

1. At common law the lord was obliged to avow on his right tenant. When alienation became frequent, this was attended with much difficulty, but was remedied by stat. 21. Hen. 8. c. 19. which enacted, "That the lord might distrain on the lands holden of him, and avow generally, as within his fee, without naming any tenant in particular."

9 Co. 22. a.

1. Though the words of the statute are, that the lord may distrain *on the lands* within the lord's fee; yet *if the beasts have been driven off*, but pursued by fresh suit, the lord may distrain off the lands.

Co. Litt. 268. b.

2. Notwithstanding the statute, the lord may still avow either at common law or under the statute, at his election for the words of the statute are, *may avow*.

Ibid.

3. Though the lord may avow without naming any person against whom he so avows, yet he must alledge seisin by the hands of some certain tenant, within forty years.

Ibid.

4. If the defendant avows, according to the statute, every plaintiff in the replevin or second deliverance, may avail himself of every answer to the avowry that is sufficient, except disclaimer, which he cannot have, as the lord avows upon one certain. § 4. stat. 21. H. 8.

Lucy v. Fisher.  
Cro. Eliz. 146.

5. The defendant in his avowry in this case, mentioned the name of the tenant, which the statute does not require, concluded, "*secundum stat.*" &c. It was nevertheless well within the statute, though the name should not have been mentioned.

Brokerv. Smith.  
And. 159.

6. Where the tenant conveyed to the king, and the king granted the land over to B. it was held, That the lord could

not avow upon *B.*; for by the tenant's grant to the king, the tenure was at an end, as the king could not hold of a subject: therefore the lord should have declared according to the circumstances of his case.

*Note.* If in replevin either party avows or justifies under a particular estate, the commencement of it must always be shewn. *Scilly v. Dally.* Salk. 562. Co. Litt. 283.

This statute is general, and extends to all distresses made by the lord, as for rents, customs, services, &c.

And its provisions have been more universally extended, as will appear under the head of Rents.

These cases go to the form of pleading. I shall now consider *Replevin with reference to the things for which it lies; or what are good causes of Avowry*, and for what it cannot be made.

#### I. WHAT ARE GOOD CAUSES OF AVOWRY.

Wherever the party has a right to distrain, there he may well avow the taking.

Under this, it will therefore be for consideration for what causes by law a distress may be made.

These are, 1st. For rent-arrear. 2dly, For damage feasant. 3dly, For fines or amercements in courts leet or baron. 4thly, For tolls or customs. 5th, For suits or services claimed by custom of the manor. 6th, For poor's rates.

And, first, Of distress for

#### RENT-ARREAR.

By the common law, a power of distraining for rent was annexed to the person to whom the fealty of the land belonged; and whenever he made any grant reserving the fealty and rent to himself, this was called *rent-service*, and for it, by common law, he could distrain. *Co. Litt. 142.*

But where he parted with the whole fee, reserving a rent, but in the grant reserved a power of distress, if the rent was in arrear; in that case, as the power of distress arose under the grant, it was called a *rent-charge*. *Ibid.*

*Rents sec* are rents granted in like manner as rent-charges, but with no clause in the grant reserving the power of distress: for these therefore no distress could be made at common law. But it is now enacted by statute 4 Geo. 2. c. 28. "That

"rents sec, rents of assize, and chief rents, may now be distrained for:" so that now all rents are on the same footing, in point of distress.

Brown v. Duncry.  
Hob. 208.

But, 1st, If the clause in the lease is, "That if the rent be behind, *being demanded at another place beside the land, or of the person of the lessee*, that the lessor may distrain:" there, if the lessor distrains without any demand, it is unlawful; for the form of the demand is different from what the law requires, and must be complied with.

Maud's case.  
7 Co. 28. b.

But if the clause is, "That if the rent be behind, *being lawfully demanded*, that then he may distrain; it is no more than the law speaks, and therefore *the lessor may distrain without a previous demand*; for the distress is itself a demand.

"But where there is any *penalty annexed* to the non-payment of the rent, and a distress given for it, there a demand must be laid."

Howell v. Sambach.  
Hob. 133.

As where the avowry was for rent and a *nomine pænæ*, and no demand alledged, the avowry was held to be clearly ill for the *nomine pænæ*, for the want of a demand, but good for the rent: and the defendant had return for that.

Sir T. Wentworth's case.  
Hutt. 42.

But where the issue was on a collateral matter, *viz. non concessit*; though there was no demand laid of the *nomine pænæ*, it was held to be cured by a verdict.

Fairfax v. Grey.  
2 Black. Rep. 1326.

2. Where the plaintiff who was tenant in fee, granted lands to trustees to the use of the defendant for ninety-nine years, the trust of which term was to secure an annuity of 250*l. per annum* to the defendant, with power of distress if in arrear, and he had distrained; it was objected, That the legal estate being vested in himself, that he could not distrain upon lands in his own possession; but the court over-ruled the objection, holding the grantor to be *quasi* tenant to the defendant at a rent to the amount of the annuity.

3. "Where a man is *sole seised, or has a title to an entire rent*, he should distrain for it all at once; for the law will not allow multiplicity or splitting of actions."

Sir Th. Holt v. Sambach.  
Cro. Car. 103.

And therefore, if the defendant avows for half a year's or a quarter's rent, *he should set out how the rest was satisfied*; for otherwise there may be another distress and avowry for the residue.

"But if the defendant avows for more than is due, though the avowry is for that reason bad, yet it may be cured."



As where he avowed for rent due at *Michaelmas*, and the distress appeared to have been made on the 26th day of *September*, which was three days before *Michaelmas*; it was held, That though the avowry was bad (for the judgment is to have a return irrepleviseable till all the rent avowed for is paid, and so would be for more than was due) "yet that the defendant might, before judgment, abate his avowry for so much as was claimed to *Michaelmas*, and take his judgment for the rest."

Richards v. Cornforth. Salk. 580. 8 Co. 45. b.

"But where one is not so seised, or has not a sole title to the whole rent, he cannot avow alone, or his avowry shall be a bad."

As where in replevin the defendant made *conusance* as bailiff to the Countess of *Salisbury*, for rent-arrear, and shewed that the lessor was seised in fee, and died, and the reversion descended to the Countess of *Salisbury* and her sister; on demurrer, the court held the *conusance* to be bad; for the rent is an entire inheritance, and the two sisters make but one heir, and so should have joined.

Stedman v. Bates. Salk. 390.

"Where lessee has entered under a lease, though his entry has been tortious, yet it seems that that shall not avoid the payment of the rent, but the avowry for it be good."

For where in replevin the defendant avowed for rent, under a lease dated the 24th of *June*, *habend. a præd. 24 June, &c. virtute cuius*, the plaintiff entered on the said 24th of *June*; on demurrer it was objected, That the plaintiff was a disseisor, by entering on the 24th, when the lease did not commence till the day after, and consequently that the possession was not under the lease, but by virtue of a tortious fee; but the court gave judgment for the avowant, for that there was a great difference between this case and an ejectment; for here, be the entry tortious or not, it does not discharge the contract for the payment of the rent.

Macdonnel v. Welder. 1 Stra. 550.

5. "Though the defendant may have good title to the rent, yet may the distress be tortious."

As if he comes on the land to distrain, and the tenant then tenders the arrears due; in such case, if he distrains the cattle, it is tortious, and the defendant may replevy.

8 Co. 147. a.

But it is not sufficient for the tenant to say that he was on the land on the day, and ready to pay the rent; for if he did not make a tender at the time of the distress made, the taking is not tortious.

Crawley v. Stillington. Hutt. 13.

And the tender must be before the impounding; for then the goods are in *custodia legis*.

P.ington v. Hastings. Cro. Eliz. 813.

6. Many

6. Many difficulties formerly occurred in avowries, from the circumstance of requiring the defendant to set out his title at large.

This has been remedied by statute 11 Geo. 2. c. 19. which enacts, "That defendants in replevin may avow generally, that the plaintiff held under such an article, &c. at such certain rent, during the time that the rent so distrained for incurred, which rent still remains due," *without setting out the grant, tenure, or title of such landlord or lessor.*

Sullivan v.  
Stradling.  
2 Will. 208.

This statute was made for the benefit of landlords, that after the tenant had enjoyed the land, he should not be allowed to pry into the lessor's title: therefore, if the defendant avows under the statute, *nil habuit in tenementis* is a bad and inadmissible plea, for it attempts to bring the lessor's title in question; for if the premises were in mortgage for example, the defendant, if this plea was allowed, could not recover his rent, which the statute never had in contemplation to prevent, but rather to assist.

Adams v. Croft.  
1 Vent. 182.

Before this statute, in cases of copyhold, where the title did not come in question, as in avowry for rent, it was sufficient for the defendant to state his being seised, &c. according to the custom of the manor, at the will of the lord, without stating any admission under the surrender.

7. By statute 32 Hen. 8. c. 37. "The executors and administrators of tenant in fee, in tail, or for life, of rent-*services*, rent-charges, rent-*services*, or fee-farms, may distrain upon the lands chargeable; so long as they remain in the tenure and occupation of the tenant, who ought to have paid, or any person claiming under him by purchase, gift, or descent."

"And the same remedy is given to husbands seised in right of their wives or other persons, after the death of *cestui que vie.*"

Under this statute, it has been held,

1. "That it extends but to the persons mentioned in it, *executors, &c.* not to others, though in similar circumstances."

Pool v. Duncomb.  
Trin. 1657.  
Buller N. P. 56.

As where tenant for life of a rent-charge confessed a judgment, and an *elegit* issued, under which the rent-charge was extended: tenant for life died, and the *conusee distrained* *avowed* in replevin for the arrears incurred in the life-time of the tenant for life; on demurrer, it was held to be a bad distress, and not warranted by the statute: 1st, Because the

case of a *conusee* is not enumerated in it: 2dly, Because he comes in in the *post*, not under the tenant for life.

2. The words of the statute are, "of tenants in fee-tail, Co. Litt. 162. or for life." This, Lord Coke says, is to be intended of tenants *pur auter vie*, so long as *cestui que vie* lives, who may distrain under the statute, though by common law they could not do so.

But it has since been extended to all *tenants for life*.

Per Cur.  
1 Raym. 173.  
Turner v. Lee.  
Cro. Car. 471.

The statute makes no mention of *leases for years*, and therefore it should seem that the *executors of lessee or grantee of a rent-charge for years, if he so long lives*, were not within the statute, and therefore could not distrain for arrears due in the life-time of their testators; for he was not tenant in fee-simple, fee-tail, or for life, of such a rent.

However, in an action of trespass for distraining the plaintiff's goods, it appeared that the defendant was an executor, and distrained the plaintiff's goods *for rent-arrear due to his testator, on a lease for years*\*, and Lord Chief Justice Lee held the case to be within the statute; and the defendant had a verdict.

Powell v. Killick.  
West Mic. 25  
Geo. 2.  
Buller N. P. 57.  
If not  
"Who was lessee for years."

But it has been held, That the statute does not extend to *rents out of copyholds*.

3. The statute gives no new right of distress which the testator had not; therefore if the tenant had granted away or deprived himself of the right of distraining, the executor cannot do it.

4. So under the words of the statute, the distress can only be made on the tenant in whose hands the lands were chargeable, or some person claiming under him; and therefore not in the hands of a person claiming by title paramount; as if the lands should *escheat*, a distress could not be made when in the hands of the lord.

And therefore it is always necessary in an avowry by executors or administrators who have distrained for rent-arrear, that they aver "that the land remains in the possession of the tenant who ought to have paid, or some person who claims under him;" for to such cases only does the statute extend.

Miles v. Willoughby.  
Cro. Eliz. 547.

5. If a person distrains as executor or administrator, he must bring himself within the statute: but where the avowry was as *administratrix* of rent, to which the defendant was *intitled*

Brown v. Duncnery.  
Hob. 208.

*intituled in her own right*, she nevertheless had judgment; that part respecting the claim as administratrix being rejected as surplusage.

**Bowles v. Poor.**  
Cro. Jac. 283.

And *Note* in general, That if the defendant avows for rent in arrear at *Michaelmas*, and at the time of the taking, the avowry is good though it does not say "*and which is yet unpaid*;" for the avowant avoids the injustice of the caption, if he shews that the rent was in arrear *at the time of taking the distress*; and no tender after could make the distress illegal.

**Pope v. Skinner.**  
Hob. 72.

And so there may be judgment in replevin, though the party mis-recites his title, provided he shews a good and subsisting one. As where, in this case, the party stated himself as intitled, under a lease made the 30th of *March*, and the jury found it the 25th of *March*; it was held to be good enough to give the party a title.

## 2. OF AVOWRY FOR DAMAGE FEASANT.

This taking of cattle or goods damage feasant, may be either for a trespass done, 1st, To one's own land: 2dly, To commons.

**Co. Litt. 142.**  
**Id. 161.**

1. In the case of distresses for damage feasant to *one's own land*, it is sufficient to observe, 1. That the distress for it may be made *in the night*, which in the cases of distress for rent it cannot be: 2. That the distress must be made *while the beasts are actually on the land*, for if they are driven off before they are seized, the person on whose land they were, cannot follow and seize them: 3. Where the distress is for damage feasant, the party may tender amends till the cattle are impounded; but after that it is too late, and a tender to the bailiff is not good.

**Pilkington's case.**  
**5, Co. 76.**

2. In the cases of distresses for damage feasant to *commons*, the question is of more extent.

Injuries to the commoners right of common may be committed, 1st, By the *lord* putting in beasts not commonable, as hogs or goats; or by surcharging it: 2dly, By another *commoner* who is guilty of the same offences: 3dly, By a *mere stranger* putting his cattle on the common.

## 1. As to the Lord.

It is a general rule, that a *commoner* cannot distress the *lord's* cattle for surcharging the common; except in the case where the lord has at the time no right to put any cattle at all on the common.

As where the custom was, that the land was to lie *entirely* <sup>Trulock v. White.</sup> *free* every second year till *Lady-day*, during which season the lord was totally excluded; <sup>1 Roll Ab. 405, 506.</sup> *during that time he put cattle on*, and it was held, That the commoner might distrain them, he having then clearly no right to put on any cattle whatever.

## 2. In the Case of another Commoner.

Wherever a commoner is intitled to common for a certain <sup>Dixon v. James.</sup> number of cattle, as ten or twenty, there if he surcharges the <sup>2 Lutw. 1238.</sup> common, *another commoner may distrain for the overplus*; for in such case the number being settled, the injury to the rights of others is evident.

But wherever the commoner's right of putting on cattle <sup>Hall v. Hard- ing.</sup> *is not ascertained in point of number* (as for example, if it depends on the number of acres which he holds) so that he has a colour to put in some cattle; in that case, though he may exceed the number, another commoner *cannot distrain* his cattle, but is driven to his writ of admeasurement of common: for as well in this case as that of the lord before, the commoner is not to judge for himself *where a wrong is not clearly committed*, but must recur to a competent and indifferent jurisdiction by writ of admeasurement, or he may have an action on the case for the surcharge of the common. *Post Chap. of Trespass on the Case.* <sup>4 Burr. 2426.</sup>

In this case the commoner claimed a right of common for <sup>S. C.</sup> two sheep for every acre he held: so where the commoner <sup>4 Burr. 2431.</sup> claims common for cattle *levant and couchant*; in these cases another commoner cannot distrain, for the number depends on the land in possession of the commoner, and such cattle as are necessary to manure it.

## 3. In the Case of a Stranger.

The commoner *may distrain his cattle without question*, for he has *no colour* of right.

In general, as to this avowry for damage feasant to common, it is to be observed,

1. "That it is different where it is for a number certain or uncertain."

For if a man prescribes for a *certain number of cattle*, it is <sup>Richards v. Squibb.</sup> not necessary for him to say *that they were levant or couchant*; <sup>1 Ld. Raym. 726.</sup> because it is no prejudice to the owner of the soil, the number being ascertained.

But

Harding v.  
Johnson.

Mich. 20 G. 2.  
Buller N. P.  
59.

But where the *number is uncertain as levant and couchant*, for example, a prescription for all cattle *levant and couchant* will be good, and need not be for all his cattle; for levancy and couchancy are terms sufficiently ascertaining what cattle may be put in; for no more shall be said to be levant and couchant than the land is sufficient to maintain; and if the plaintiff was guilty of any fraud, as to that the defendant may take advantage of it by pleading.

2. "If a commoner justifies under a right of common, it must be *by good and lawful prescription*."

Gateward's  
case.

6 Co. 60, b.

Agnes Fowler  
v. Dale.

Cro. Eliz. 262.

Therefore a prescription that every *inhabitant of a vill* should have common without such a place, is bad.

For such right would be transitory and uncertain, for it would follow the person, and for no certain time or estate; but custom ought to have certainty and continuance.

English v. Bur-  
nell.

2. Will. 258.

So on account of the same weakness of estate, a prescription claimed by the defendant, as *occupier of certain messuages* to a right of common, was adjudged to be ill.

3. "Wherever a commoner relies on a prescriptive right to common, he should set out *the whole of the prescription as in fact it is*."

Lovelace v.  
Reynolds.

Cro. Eliz. 346.

For where the defendant prescribed generally to have common in the *locus in quo*, and the jury found that he was entitled to common by prescription, *prout, &c. paying for it 1d. yearly to the plaintiff*; it was on this verdict adjudged for the plaintiff; for the *paying* was part of the prescription, a condition precedent, and should have been set out in pleading the prescription.

"But where any *collateral matter is connected with the prescription*, but makes no part of it, it need not be set out."

Gray's case.

5 Co. 78.

Cro. Eliz. 405.

S. C.

As where a copyholder prescribed to have common, and the jury found that he was entitled to the common, *but that it had been the custom to pay yearly for the same an hen and five eggs to the lord*, it was held, That the prescription was well pleaded, for the payment of the hen and eggs made no part of the prescription, but was a collateral demand, or rather a prescription in the lord's favour for so much.

Waring v.  
Griffiths.

1 Burr. 440.

So where the plaintiff set out a prescriptive right to bury in the chancel of the church of *Ofwestry*, and this was found to be so; but further, *that two shillings had been used to be paid to the church for every person so buried*, it was held

The

That the prescription was well pleaded, for the payment was collateral, and no part of the prescription.

4. "Under a prescription for common, the commoner must prove the *whole* of the prescription as he has laid it."

As he prescribes in his avowry to have common for *all* *commonable cattle*, and upon issue joined thereon he gives in evidence "common for *sheep and horses only*," it will not maintain his issue; for a prescription is an entire thing: but if he had a *general common*, i. e. for all kinds of cattle, and prescribed for common for any particular sort, it had been good, for it is within the general prescription.

So where a commoner prescribed for common for all the beasts levant and couchant upon a messuage, *two hundred acres of land, fifty acres of meadow, and fifty of pasture, in four towns*, and the jury found that he had common as belonging to two hundred acres of land, twenty of pasture and meadow in *two towns only*, and not in the other; judgment was given against him, as having failed in his prescription; for the prescription *claimed* was more extensive than that proved.

"But where the *nature* of the prescription is found as laid, but variant only in the *quantity of land to which it extends*, the prescription shall be held to be well laid, for it is the same prescription."

As where one prescribed to have common to his messuage, and *twenty acres* of land; and it appeared on evidence that he had but *eighteen acres*, it was held to support the prescription as laid. But if he had ten acres of copyhold and ten of freehold, he had failed in his prescription, for he could not make a prescription for both; for if it appeared on the evidence that part of the land was copyhold an hundred years ago, though then it was freehold, there too he had failed. For as the prescription must be beyond the time of legal memory; it must have been different then from what it was at first, and so there could be no prescription as was laid.

"And so if the nature of the prescription remains the same, but it is found to be *more ample* than was laid, it shall be good."

As where the prescription was, to tether horses *from and after the feast of the Pentecost yearly*, and the verdict found that they had used to do it on the day before the *Pentecost*, on the day itself, and the *Monday* in the week of the *Pentecost*, and afterwards during the year at pleasure: this finding

finding being more large than the prescription as laid, was adjudged well to support it.

Pearce v. Bacon. 5. Wherever a copyholder prescribes *against a stranger*, he must prescribe through the lord: but where he prescribes *against the lord himself*, he must alledge the prescription *by way of usage*.  
Cro. Eliz. 390.

Anon. Copyhold case 25. That is, *as against a stranger*, he must say, "That the lord of the manor and all his ancestors, and all those whose estate he has, have had common in such a place for him, and his tenants at will," &c. and that shall be good for the copyholder: but *as against the lord*, he must say, "That within the manor there is such a custom," &c.  
4 Co. 316.

### 3. OF AVOWRY FOR FINES AND AMERCEMENTS IN COURTS LEET OR BARON.

Hall v. Turbett. 1. For offences which are within the consuance of the steward of a court leet, and *of which he hath a view*, he may assess a fine, as for a contempt or disturbance in court: but for offences not within his view, he can assess no fine *without a presentment*, for *non constat*, whether the party was resident within the leet or not, or what cause he had for his absence. And therefore, where the steward assessed a fine *for not coming into court to do suit* for which the distress was made, it was held to be ill; but it seems he might be amerced: for if the fine is too grievous, the party would be without remedy; but for an amercement a *moderata misericordia* lieth, 10 H. 6. c. 7. And *note*, That for a fine as well as an amercement, a distress of common right belongs.  
Cro. Eliz. 241.  
Griesley's case. 3 Co. 3.  
Ref. 386.  
11 Co. 45. a.

But for a fine in a court baron, the lord cannot distress without a prescription.

Stevens v. Houghton. 2. In the avowry for taking by reason of an amercement for any offence, the avowry should state "that the plaintiff was guilty."  
2 Stra. 847.

Parham v. Norton. For herein replevin differs from trespass: That in replevin, the defendant makes a title, and is to recover; which can only be by shewing a title under the forfeiture: but in trespass for taking the goods, the defendant is only to excuse the wrong.  
Cro. Eliz. 885.

Matthews v. Carew. Therefore in *trespass*, it is sufficient to say, that the offence was *presented*, for *non refert* as to the defendant in such case, whether the offence was committed or not: but in replevin the offence should be set out with an averment that the party was guilty of the offence for which the amercement was made.  
Salk. 107.



3. In the case of a *court leet*, the amercement should be general by the steward, viz. *quod fit in misericordia*, and then the amount of the amercement is to be ascertained by the assessor. Brook v. Hustler. Salk. 56.

In the case of a *court baron*, the steward may in the like manner amerce. Rowleston v. Alman. Cro. Eliz. 748.

For if the amercement was by the jury, it would be bad; they can only assess the amount. Stephens v. Haughton. 2 Stra. 847.

And the amercement can only be assessed by the freeholders of the manor. Baldwin v. Tudge. 2 Will. 20.

And these matters now mentioned should always be set out in the avowry, as necessary to give a title to a return.

4. "And in every case the defendant is called upon to shew a good and complete title."

As, if, The avowry should state, "That the place where the offence was committed was within the manor or jurisdiction of the court, from which the amercement issued." Wormleighton v. Burton. Cro. Eliz. 448.

2. That the crime was cognizable in that court. S. C.

3. That the goods taken were the property of the person who made default, and was amerced; for where the goods of his under-tenant were taken, it was held to be bad under the prescription. Pill v. Towers. Cro. Eliz. 791.

4. By common right every manor has a court baron annexed to it, and therefore where it was claimed by prescription, it was held to be bad, for prescription shall not be where a thing is by common right. S. C.

5. The avowry should also shew "that the manor was in the hands of the defendant avowing, or of his principal, where there is consuance made."

For where the defendant made consuance, as bailiff to the dean and canons of *Windsor*, as of their manor of *Hampton-Court*, for an amercement for not doing suit of court; but it appearing that the dean and canons had let the manor at the time of the avowry, though they had reserved to themselves the profits of the manor and courts incident to it, the plaintiff had judgment; for the court is incident to the manor, and cannot by any exception or reservation be severed from it. Brown v. Goldsmith. Hob. 108.

And lastly, In avowing for a fine in a leet, the avowry need never conclude *proud patet per recordum*. Per Holt. 1 Lord. Raym. 1173.

## 4. OF AVQWRY FOR TOLLS AND CUSTOMS.

Under this head, I shall consider tolls, 1st, With reference to ways: 2dly, To fairs and markets: 3dly, To ports or quays.

## 1. Of Tolls with reference to Ways.

*Moor* 546.  
2 Will. 299.

Toll considered with reference to *ways*, is either toll thorough or toll traverse.

*Toll thorough* is a toll paid for passing over the *king's highway*; and this being against common right, *cannot be claimed or taken without good consideration*; as *ex, gr.* repairing the streets or ways, for the passage over which it is claimed.

So that on the ground of prescription alone it cannot be supported.

*Ibid.*  
*Fitzherbert* Ab.  
pl. 3.

*Toll traverse* is a toll paid for liberty to go across the lands of another person; and this may be claimed by prescription, *without any consideration appearing*, and payment of it from time immemorial shall be sufficient: but it can only be claimed from its nature *by the lord of the soil*, as being in its nature a compensation for the use of the soil.

1. "In claiming of toll, *thorough*, the party *must shew every circumstance intitling himself*, or the court will lean against him, from the jealousy they entertain of thus levying money upon the subject; that is, *he must shew a good consideration, and that he is within the prescription under which he claims.*"

*Trueman v.*  
*Walgham.*  
2 Will. 296.

For where the defendant prescribed to have *toll thorough*, from every cart or waggon coming from any other manor, and passing into the town of *Gainsborough*, on the consideration of repairing, cleansing, and maintaining *divers and many streets* belonging to the said town; and for non-payment distrained, and had a verdict; but judgment was afterward arrested; for as he could only claim toll on the ground of repairs, his right therefore must be confined to the streets repaired, and as he had laid his prescription for repairing *divers and many* of the streets of *Gainsborough*, it did not appear that the waggon on which the present distress was made was going over the streets repaired, and therefore the defendant might have no title.

"And therefore the party prescribing for toll thorough, is always tied down to great strictness in pleading."

As where the defendant prescribed to have a toll of two Smith v. Shep-  
 pence for every twenty sheep driven through the manor of herd.  
*Malton Mowbray* by any foreigner, and if not paid, a right Gro. Eliz. 710.  
 to *distrain* for the same, and then justified, that the plaintiff  
 having refused to pay the toll, that he *cepit et abduxit* one  
 sheep, and distrained it till the toll was paid. This justifi-  
 cation was held to be ill; for the prescription was to *distrain*,  
 and the defendant had not pleaded the taking *as a distress*, but  
 only that he *cepit et abduxit*, which was not within the pre-  
 scription.

## 2. Of Toll in Fairs and Markets.

1. The establishment of public fairs and markets is a 2 Inst. 220.  
 branch of the royal authority, and the king may by his  
 grant erect new ones, and bestow a certain toll on the per-  
 son to whom such fair or market is granted. But the toll  
*must be some petty sum*; for if the king grants a fair or mar-  
 ket, with excessive toll, it is void, and the market becomes  
 free.

So fairs and markets, and the toll incident to them, may be  
 claimed by *prescription*, which supposes a grant.

But by the grant of a fair or market, *cum omnibus liberta-* Heddy v.  
*tibus et pertinentiis*, toll does not pass; for it is not due of Wheelhouse.  
 common right, but must be given by express words in the Cro. Eliz. 558.  
 grant. This is the case of a grant of a new fair; but if 591.  
 there has been an ancient fair, to which, by prescription,  
 toll has been annexed, and it becomes forfeited to the king,  
 and he grants it to another, *cum omnibus libertatibus illi spec-*  
*tantibus*, by this the toll shall pass; for this is not a new  
 grant, but a grant of ancient fair, to which the toll be-  
 longed.

But where a fair was held by custom, *on a particular day*, Holloway v.  
 to which toll was due; and afterward the king reciting this Smith.  
 grant, granted to the same place two fairs, *on different days*, 2 Stra 1191.  
 from the former, *with all the profits, commodities, emoluments,*  
*privileges, and free customs ad hujusmodi serias pertinentiis*:  
 This was adjudged on demurrer, not to carry with it a  
 right of toll, as not being expressly given; and the fair not  
 continuing the same, the custom could not extend to it.

2. "This claim of toll being an exaction on the subject,  
 is to be taken strictly according to the grant or custom,  
 and therefore shall be confined to cases only falling com-  
 pletely within it."

Therefore where, in trespass for taking the plaintiff's Blakey v.  
 wheat, the defendant justified the taking as a distress, as Dimsdale.  
 intitled Cowp. 661.

intituled by prescription to a toll for *all corn brought into the market of Rippon for sale*, it appeared in evidence, That the corn had been sold by sample *at the plaintiff's house*, to be delivered within the month by one *Cowper*, who lived ten miles out of the town; and that it was *only carried through the borough on a market-day in a waggon to the plaintiff's house and delivered, but was never exposed in the market*. On this evidence, the taking was adjudged to be unlawful, as not being within the prescription; and though it might be *a fraud* on the market, yet that could not in this action be remedied, but should be sued for by an action on the case.

Ward v.  
Knight.  
Cro. Eliz. 227.

And Note 1. That tenants by *ancient demesne* are excused and discharged from the payment of all tolls, by reason of their tenure; but this is for the toll due in carrying the *produce of their lands*, not for merchandize.

Mayor of  
Launceston's  
case.  
Cro. Eliz. 75.  
Id. 627. S. P.

2. That though goods brought to public market may be distrained for toll, yet they cannot for *damage feasant*; for every one is of common right intitled to bring his goods and expose them to sale in a public fair or market.

### 3. Of Tolls due for landing Goods at Ports or Quays.

Salk. 249.  
2 Brownl. 181.

1. Every common river is as an high street, and therefore subject to the same law, as to toll, as was before mentioned in the case of highways.

Hethford v.  
Wills.  
1 Sid. 454.

And therefore, where the city of *Norwich* claimed a toll on all goods passing on the river, by such a quay or wharf *but without shewing any consideration*, as cleansing the river or repairing the banks, &c. On demurrer, judgment was given against them.

Vinckbone v.  
Edden.  
Salk. 248.

But where in *trover* for an anchor and sails, it was found by a special verdict, That the mayor and burgesses of *Newcastle*, by custom time out of mind, used and ought to repair the port, and *in consideration of that*, were entitled to toll of five shillings per chaldron on all coals exported, with a power of distress, and that the anchor and sails were non-payment thereof distrained: it was resolved, 1st, That it was not necessary for the mayor, &c. to shew that *actually did keep the port in repair*, it was sufficient that they were *liable*, as that was the consideration: 2dly, That the *master* was liable to have the things taken, as he was the porter as to that: 3dly, That the anchor and sails, though the instruments of trade, were distrainable.

2. So the landing of goods at any port or quay is of it-  
*self* a consideration as a benefit to the public, and a toll for  
it may be claimed by prescription only, as in the nature of  
toll traverse, without setting out any consideration, the owner-  
ship of the soil being sufficient, as, like toll traverse, it is in  
the nature of a compensation for the use of the soil.

Mayor of  
Exeter v. Trim-  
lett, quot.  
3 Burr. 1405.  
Mayor &c. of  
London v.  
Hunt.  
3 Lev. 37. S. P.

So, in an action for toll of a wharf at Gainsborough, the  
plaintiff claimed, as lord of the manor, a toll by prescription  
for all goods landed within the manor; and having set out a  
consideration, viz. the keeping a wharf within the manor  
in repair, though he claimed toll for goods landed at any  
part of the manor, it was insisted, That as he grounded the  
claim of toll on the consideration of repairing the wharf,  
that as that would confine the toll only to goods landed  
at the wharf, that he had failed in his prescription. But he  
had judgment notwithstanding; for this claim was in the na-  
ture of toll traverse, in which no consideration was necessary  
to be stated by the party claiming. For if the goods were  
landed on the manor, they had the benefit of plaintiff's pri-  
vate property, and if at the wharf the benefit of it.

Colton v.  
Smith.  
Cowp. 47.

But this toll at ports or quays differs from toll traverse in  
this respect, that it is not necessary that the parties claiming  
it should be owners of the soil, which would be of itself a suf-  
ficient title, as in the last case: for even if that does not  
appear, yet it may be good; for the crown has a right to  
create the duty, and may grant it to another, though it retains  
the port, and so if no grant from the crown appears, it may  
be claimed by prescription, so that grant or prescription may  
give a title.

Mayor of  
Yarmouth v.  
Eaton.  
2 Burr. 1402.

As where the Corporation of Kingston upon Hull claimed  
a certain toll, called water-bailiff's dues, by prescription; and  
in evidence it appeared, that their charter was in 27th Ed. 3.  
and so full a century within the time of legal memory (time  
of Richard 1.) and therefore it was insisted, 1st, That the  
corporation could not prescribe; and, 2dly, That by a  
subsequent charter in 5 Rich. 2. the port was created, and  
that therein no duties were granted to the corporation.  
But as it appeared that these duties had been paid for 350  
years, and that the grant of the port was in these words,  
"portum dudum vocat. Sayrecreek jam Hull:" On these cir-  
cumstances the court were of opinion, That it was matter  
of presumption to be left to the jury, whether the word  
dudum did not imply an existing port before the making of  
the charter of Rich. 2.? and whether the payment of the  
duty for 350 years, viz. from 1441 to 1764 (the time of  
the action) would not be sufficient to support the presump-  
tion

Mayor of  
Kingston upon  
Hull v.  
Horner.  
Cowp. 102.

tion of a grant from the crown of those duties, between the times of 5 *Rich. 2.* (*ann. 1382*) when the charter creating the port was granted, and 1441, when the first payment was proved? On this ground, a verdict was found in favour of the corporation's right to toll.

3. "As therefore toll may be claimed at ports or quays in the nature of toll-thorough, on the ground of the benefit derived to the subject from the use of the port or quay, and its being kept in repair by those claiming the toll; where that benefit is not enjoyed, no toll is payable; that is, user of the port is necessary to give a claim to toll."

*Prideaux v.*  
*Warne.*  
*Sir T. Raym.*  
*231.*  
*2 Lev. 96.*

For where the defendant avowed for toll as due from all ships unloading at the quay, on the ground of repairing the port: In evidence, it appeared, *that the quay extended but half a mile, and that the ship in question had unloaded seven miles from the quay*, the prescription was adjudged not to extend beyond the quay, and that the plaintiff was not liable to the payment of toll, he not having used the quay.

*Haspert v.*  
*Wills.*  
*1 Vent. 718.*

So where a custom was alledged in the city of *Norwich*, that in regard that they maintained a common quay for the unloading of goods brought up in the river in vessels to the said city, that every vessel passing *through the said river by the said quay*, should pay a certain sum. This was held to be a void custom; for it *should not extend to those vessels which never unladed at the port*, and so derived no benefit from it.

4. "In prescribing for a toll or customary payments; it should be for a *sum certain and defined.*"

*Sergeant v.*  
*Read.*  
*1 Wils. 91.*  
*2 Stra. 1228.*  
*S. C.*

But a prescription to have three bushels out of every cargo of barley brought to the quay of *Penzance* was held good, though the cargoes might be of different magnitudes; for the word *cargo* is a mercantile word, and sufficiently certain and determinate.

*Clarywalk v.*  
*Constable.*  
*Cro. Eliz. 110.*

5. If a person justifies the seizing of any goods, &c. he should state the particular cause of seizure; as for toll, forfeiture, or custom: and 2dly, It seems that he ought to say that it had been usual to seize; for it is no custom or prescription if not put in use.

#### 5. OF AVOWRY FOR SUITS AND SERVICES, OR OTHER THINGS CLAIMED BY CUSTOMS OF A MANOR.

As, first, For an *Heriot*.

*Shaw v.*  
*Taylor.*  
*Hutt. 4.*  
*Hob. 176. S. C.*

If the defendant avows the taking for an *heriot* generally, it is bad; it should be for the *best beast* or so, that the plaintiff might have his replication that the deceased <sup>had</sup>

had no beast; and besides, the heriot might be of a thing different from that taken, as it may be a *jewel* or *piece of plate*, as well as the best beast or living thing.

And where the lord is intitled to *Heriot service*, he may Odiham v. disfrain generally, or seize *any beast* of the tenant: for it is Smith.  
at his election to take what beast he deems the best; but for Cro. Eliz. 589.  
*heriot custom* he must take the beast itself, not *another as a* Major v.  
*distress* for it; for it lies in prender and not in render. Brandwood.  
Cro. Car. 260.

2. "Wherever a distress is made for any sum claimed  
"as due by custom, it must be a reasonable one; for if  
"unreasonable, it is void."

As where the defendant made consuſance as bailiff to the Holland v.  
dean and chapter of *Canterbury*, to whom the plaintiff was Lancaster.  
lessee, and claimed, that, by the custom of the manor, the 2 Vent. 124. 1  
lessee on alienation was to pay a fine of a year and a half's  
rent, and if not paid, a distress. On demurrer, the plain-  
tiff had judgment; for the custom was unreasonable, as so  
upon every alienation of even the smallest part, the same fine  
would be due.

So where the lord claimed by custom the best beast of Parker v.  
*every stranger* dying within the manor as an heriot. On de- Combleford.  
murrer, the custom was adjudged to be ill; for it cannot Cro. Eliz. 725.  
be supposed to have a reasonable or lawful beginning, as is the  
case between the lord and his tenants, who may be supposed  
to have made the agreement when their tenures began, as a  
species of consideration; but no such consideration or agree-  
ment can be supposed to subsist in the case of a stranger.

3. "Wherever the defendant, in his avowry, relies on a  
"custom to take a distress for suit or services, he should set  
"out *the whole* of it."

For where the defendant avowed under a custom, that  
the lord of the manor was intitled on the death or alienation Griffin v.  
of every tenant, to the second-best beast, and if but one, Blandford.  
then to that beast; and if no beast, then to a compensation Cowp. 62.  
in lieu of it. Upon evidence, the custom appeared to be as  
stated, *but with an exception* of mesne signiores, burgage-  
tenures, and alienations to the use of the alienees and their  
heirs: and the avowry was for that omission held to be ill.

4. The defendant in this case avowed the taking of two Richard God-  
cows, for cause that he was seised of the manor of *Bethel in* frey's case.  
*Norfolk*, and that from time immemorial he and those, &c. 11 Co. 42.  
had been intitled to a leet within the said manor, and that the  
steward had used to swear twelve of the inhabitants as chief

pledges, to present all things within the leet, and that they had been used to present, that they should pay themselves to the lord ten shillings *pro certo leet*: That the plaintiff and others being sworn chief pledges, had refused to present such sum of ten shillings to be paid as aforesaid, wherefore the steward had then fined them in six pounds, and avowed the taking for the non-presenting or paying of the several sums of ten shillings and six pounds: To which avowry the plaintiff demurred: when it was resolved, 1st, That the fine was unlawfully imposed; for it was imposed jointly, but it ought to have been assessed severally, for the offences are distinct: one might after payment of his part lie in jail till the whole was paid, which would be unjust; and such matter being shewn by plea, should avoid the fine. 2dly, That for the certainty of leet, the lord could not distrain of common right: for it is for the private advantage of the lord, and he therefore could not have it *without prescription*, which he therefore should shew.

## 2. OF CASES IN WHICH NO REPLEVIN CAN BE MADE, AND SO NO AVOWRY.

1. "*Goods taken beyond sea*; that is, in foreign countries, though afterwards brought into *England*, cannot be replevied."

Nightingale v. Adama.  
2 Show. 91.

As where goods were seized by the *East India Company* from interlopers on their trade in *India*, within their charter it was held that no replevin lay for them: for the capture might there have been lawful, though not so with us; and therefore should not be tried by our laws.

Broke tit. Repl.  
Pl. 34.

2. Replevin does not lie for the *charters relating to lands of inheritance*; for they belong to the heir, and therefore are not chattels, and so not repleviable.

3. *Goods seized in consequence of any judgment or adjunction of courts*, or persons having jurisdiction, are not repleviable.

Win v. Forster.  
Latw. 1191.

As if taken under an *execution from the superior court* they cannot be replevied; and if attempted to be so, the court will commit the offender for a contempt.

Aylesbury v. Harvey.  
3 Lev. 204.

So where a person's goods were seized under a *condition in the penalty of 20l. before a justice of peace*, for not entering strong waters, and he replevied them, the justice's warrant was held to be a sufficient justification, and to support the seizure, which therefore could not be replevied.



And where goods had been so seized under a *conviction* Rex v. Monks-  
house.  
2 Stra. 1184.  
for ~~theft~~-stealing, the court granted an attachment against  
the under-sheriff, who had granted a replevin for them.

4. So a replevin does not lie against *the king*, nor where Year Book.  
19 H. 7. 2.  
the king is party, nor where the taking is in the right of the  
king; for all the king's debts are of record, so that the taking  
for them is as for a judgment.

5. In general, replevin will not lie without a property in Ante.  
2 Roll. Ab.  
430.  
the goods, taken either absolute or special; and therefore  
animals *feræ nature*, unless reclaimed, cannot be replevied.

3. The third process in pleading in this action, is the

REPLICATION,

or plea to the avowry.

1. *Disclaimer* was formerly an usual replication, in which Co. Litt. 268.  
the plaintiff disavowed the holding of the land from the de-  
fendant: but this is now unusual; for in that case the avowry  
must have been on a *certain tenant*, which now not being  
usual since the stat. *Hen. 8.* allowing an avowry generally on  
the land, the replication of disclaimer now seldom occurs.

2. If the defendant makes consuance as bailiff to *J. S.* Trevilian v.  
Pyne.  
Salk. 107.  
the plaintiff may traverse the fact that he was bailiff; for  
though *J. S.* may have a title, yet a stranger who had no  
authority from him, could have no title, and would be liable;  
so that both parts of the defendant's plea must be true, and  
therefore an answer to any part is sufficient.

3. If the defendant justifies the taking, the plaintiff may 8 Co. 147. a.  
reply a *tender*, and have judgment: for if a tender was made  
upon the land before the taking, the distress is unlawful;  
and if made after the taking, and before the impounding,  
the detaining is unlawful.

But a tender to a servant is not sufficient.

And if the defendant avows for rent, the plaintiff may Cro. Eliz. 813.  
Co. Litt. 145.  
Buller N. P.  
60.  
plead a tender and refusal, without bringing the money in-  
to court; because if the distress was not rightfully taken, the  
defendant must answer in damages.

4. " If the defendant justifies under a custom, the plain-  
tiff cannot reply another custom repugnant to it, without tra-  
versing that set out by the defendant, but the plaintiff may  
reply some qualification of the custom set out by the de-  
fendant,

"fendant, which admits the custom of *sub modo*, without any traverse."

**Kenchin v.  
Knight.**  
1 Will. 253.

As where the trespass *quare clausum fregit*, the defendant pleaded a custom, that all the tenants and occupiers of certain ancient messuages had a right of common, and under such custom justified the putting in of swine. The plaintiff replied, and confessed the custom as pleaded to be true; but added, that the custom went further; to wit, *that the swine should be rung*, to prevent them from rooting up the soil. This replication was held to be good without a traverse; for the customs were not different, but this a qualification only of the custom set out by the defendant.

**Palmer v.  
Stannage.**  
1 Lev. 43.

5. If the defendant avows the taking for rent-arrear, it is a bad replication to say that the defendant had made a distress, and *avowed for rent due at a day later than that for which he then avows*; for that is no bar.

6. "To an avowry for rent-arrear, it is a good replication *that the plaintiff paid the ground-rent to the original land-lord.*"

**Sapcford v.  
Fletcher.**  
4 Term Rep.  
511.

For where the avowry was for 50l. for rent due at *Christmas*, for the plaintiff's house; the plaintiff replied as to 20l. part of the 50l. that the defendant held the house in question tenant to the *Duke of Portland*, at a certain ground-rent of which 20l. was in arrear and not paid by the defendant: that this sum being demanded of the plaintiff, and being threatened to be distrained for the same, that he paid it, and that therefore as to that 20l. that nothing was in arrear: To this there was a general demurrer, and the plaintiff had judgment, the court being of opinion, That an under-tenant had a right so to pay the ground-rent for his own security.

## 2. REPLEVIN CONSIDERED WITH REFERENCE TO THE PERSON.

**Co. Lit 145. b.** 1. If the goods of several persons are taken, *they cannot join in the replevin*, but each must have a several replevin. For if the caption is unjust, each has received a separate injury, for which he ought singly to complain; but if they joined, each would be complaining of the injury done to the other, which would be absurd.

**Willis v.  
Fletcher.**  
Cro. Eliz. 530.

Therefore *tenants in common* should not join, but have several avowries.

**Stedman v.  
Barea.**  
Salk. 390.

But *coparceners* should join in an avowry, for they make but one heir.

So also should joint-tenants.

2 Lut. 1211.

2. If the cattle of a *feme sole* be taken, and she afterwards intermarries, *she husband alone* may have replevin; for by the marriage all the personal property of the wife becomes absolutely his. But if the wife joins in the replevin, after a verdict, judgment will not be arrested; for the court will presume them to be jointly interested (as they must be if a distress is taken of goods, of which a man and woman were joint-tenants, who afterwards marry) the avowry admitting the property to be in the manner it is laid.

F. N. B. 169.  
Bourne et ux.  
v. Mattaire.  
Pasch. 8 Geo. 2.  
Bull. N. P. 53.

So where *rent* is due to the *husband and wife*, yet may the husband alone make avowry, but he must set out the truth of the case, that the rent was due to him and his wife, and aver her life, and so that the rent is due to him.

Wife v. Bollent.  
Cro. Jac. 442.

3. *Executors* may maintain replevin for the goods of the testator, though taken in his life-time; for as the testator's property is transferred to the executor, the right must be also transferred of recovering possession of it.

Arundel v.  
Trevil.  
1 Sid. 81.

4. If *A.* takes my goods by command of *B.* I may have replevin against both; for it being a trespass, both are principals.

2 Roll. Ab.  
431.

### 3. OF THE JUDGMENT, COSTS, AND DAMAGES.

1. "If the defendant in replevin has judgment, it is for a return of the beasts which had been taken by him, and restored to the plaintiff."

But he can have a return of no more beasts than he avows for.

Sir Henry Snelgar v. Henston.  
Cro. Jac. 611.

And 2. By statute 21 Hen. 8. c. 19. "Every avowant and other person that makes avowry or consuance, or justifies as bailiff in replevin, or second deliverance for rents, customs, or services, and damage *feasant*, if the plaintiff be barred, shall recover damages and costs."

Though in this statute only rents, customs, services, and damage *feasant*, are mentioned, yet it shall extend to give to the avowant costs and damages in other cases not there mentioned; as in avowry for *amercements in leets, beriets, estrays*, &c. if the plaintiff is barred.

Hafelov v.  
Chaplin.  
Cro. Eliz. 257.  
& 329.

But where the avowry was for an *amercement in a leet*, and the plaintiff was *non-suited*, upon which the defendant had a return, the court were of opinion, That he could not have

Porter v. Gray.  
Cro. Eliz. 300.

have his costs and damages, as not being within the statute.

But *quære*, If there is not a difference in case of trial and verdict and a non-suit, otherwise these two cases contradict each other.

Gamon v.  
Jones.  
4 Term Rep.  
509.

In this case, the judgment in replevin was, "that the defendants have return of the cattle, that they recover their damages and costs (which they had before assessed) and also a further sum by way of increased costs, which damages, costs, &c. amount together to 65*l*." on a writ of *replevin* it was assigned, That this was bad as a common law-judgment, because it did not adjudge a return of the cattle *irreplevisable*: and bad as under stat. 17 *Car.* 2. there being no value found: but it was resolved, that this was good either as a common law-judgment, without saying that the return should be *irreplevisable*, for that since the stat. *Westm.* 2. (*pag.* 379.) the return was *irreplevisable*, or that it was good as a judgment, under stat. 21 *Hen.* 8. 19.; under which the defendant is intitled to judgment for his costs and damages.

Jones 136.

Neither does it extend to give costs and damages in an *avowry* for a *nomine pœne*, for it is not mentioned in the statute: and therefore if costs and damages should in these cases be given, the judgment would be reversed.

3. By statute 17 *Car.* 2. c. 7. it is enacted, "That wherever the plaintiff in replevin shall be non-suited before issue joined in any court at *Westminster*, that the defendant making a suggestion in the nature of an *avowry* to ascertain to the court the cause of the distress, the court shall award a writ of inquiry to the sheriff of the county where the distress was taken, and the sheriff having given fifteen days notice to the plaintiff or his attorney, shall execute such writ of enquiry by a jury of twelve men, and the defendant shall have execution for the sum found, by *feri facias*, or by *elegit*, in case the goods taken amount not to it, and the costs of suit."

Under this statute it has been resolved,

Waterman v.  
Yeo.  
2 Will. 41.

1. That if the plaintiff becomes non-suit, that the defendant is not bound to take his remedy under the statute; for he may have his option either to proceed by writ of inquiry under it, or bring his action against the plaintiff and his sureties on the replevin-bond.

Cooper v.  
Sherbrook.  
2 Will. 116.  
Anon.  
Litch. 72.

2. But if the defendant does proceed under the statute by suing out a writ of inquiry, and also a *retorno habendo*, as writ of second-deliverance shall be a superseas to the writ of *retorno habendo*, but not to the writ of inquiry; so that the

the plaintiff shall have his cattle, and the defendant his arrears, costs, and damages, by virtue of the proceedings under the statute.

For the damages are not for the things avowed for, but are given by statute 21 Hen. 8. c. 19. as a compensation for the expense and trouble the avowant has undergone: and therefore though the writ of second-deliverance supercedes the effect of the defendant's judgment or non-suit, viz. a return of the goods, yet the damages still continue. *Sed quære*, If under writ of inquiry the defendant shall not recover all the rent avowed for, besides his costs and damages? For per Justice *Barbours*, in *Cooper v. Sherbrook*, ante, by statute 17 Car. 2. The legislature intended that the proceedings under the statute by writ of inquiry, *fieri facias* and *elegit*, should be final for the avowant to recover his damages, and that the plaintiff was to keep his cattle, notwithstanding the course of awarding a *retorno habendo*, which is a right judgment (and still is entered up as before the statute); for the statute hath not altered the judgment at common law, but only gives a further remedy to the avowant.

4. By the same statute, 17 Car. 2. c. 7. it is further enacted; "That if the plaintiff be nonsuited after avowry, or have a verdict against him, that the jury that try the issue shall inquire of the sum in arrear, and also of the value of the goods, &c. taken, and the defendant shall have judgment by *fieri facias* and *elegit* as before.

"And if upon demurrer the defendant has judgment, a writ of inquiry shall go in like manner."

Under this statute it has been resolved, that if the plaintiff is nonsuited after avowry, the jury only who try the cause can assess the arrears, damages, &c. and that if they omit it, it cannot be supplied by a writ of inquiry, for the statute expressly confines the inquiry of the rent in arrear, damages, &c. to the jury impanelled to try the cause.

And therefore, in case of such omission, the defendant must take his judgment, *de retorno habendo* at common law.

"So the jury must find under this statute, as well the amount of the rent-arrear as of the value of the goods distrained."

For where the avowry was for 195l. three years rent in arrear, and the jury found a verdict to that amount, as damages to the amount of the rent, but did not find either the amount of the rent or the value of the things distrained; this was held to be error, but the court allowed the judgment to be amended to a judgment *pro retorno habendo*, after a writ of error brought.

"But

Pratt v. Randle. Salk. 95. Baker v. Lade. 2 Carth. 252.

2 Will. 117.

Bull. N. P. 58.

Chesv. v. Culpepper. 1 Lev. 265. 1 Vent. 49. S. C.

Tucker v. Stevens. Pakh. 6. Geo. 1. C. B. Bull. N. P.

Rees v. Morgan. 3 Term Rep. 349.

" But this is confined to cases within the statute; as in  
" *avowries for rents.*"

Dewell v.  
Marshall.  
3 Will. 442.  
Herbert v.  
Waters.  
Salk. 205.  
8. P.  
Per Gould Just.  
2 Blackst.  
Rep. 921.

For in this case where the defendant avowed the taking as a distress for *poor's rates*, and the jury omitted to inquire of the damages, the court granted a writ of inquiry to supply the defect.

And in general, in the case of *Valentins v. Faucet*, 2 *Str.* 1021. & *Cal. Temp. Hardwicke*, 138. Lord *Hardwicke* laid it down, That in every case, unless where the court is tied up by stat. 17 *Car.* 2. which respects only rent-arrear, a writ of inquiry may be granted, in order to do complete justice,

Therefore it was so held in the case of *poors rates*.

Humfrey v.  
Misdale.  
Comb. 11.

So where the defendant avowed for a taking for *damage feasant*, and the plaintiff was non-suited, it was held that a writ of inquiry should be granted.

Per Cur.  
Cal. K. B.  
119, 610.

And note, That in writs of inquiry the jury set their hands and seals to their verdict, and upon the trial of such writs, the judge of *Nisi Prius* is only assistant to the sheriff, and has no judicial power; and if the parties come to any agreement at the trial, the way is to bring it to the judge to sign, and afterwards move to have it made a rule of court.

" The cases of non-suit after avowry, mentioned in the  
" statute, apply only to cases of *non-suit at the trial.*"

Eggleton v.  
Smart.  
2 Black. Rep.  
375.  
Jones v. Con-  
eannen.  
3 Term Rep.  
661.

For as in replevin both the plaintiff and defendant are actors, either may carry down the cause to trial; and therefore *the defendant cannot move to have judgment as in case of a non-suit for not proceeding to trial*; for he might have given notice himself; in which case, if he had not gone on to trial, he would have had costs against him; but if the plaintiff had given notice of trial, it seems that he should pay costs,

Ingle v.  
Wordworth.  
3 Burr. 1284.

5. Where there are several defendants, and one of them pleads *non cepit*, and is acquitted, in which case, under stat. 8 & 9 *W.* 3. c. 11. in *actions of trespass*, he would be intitled to his costs against the plaintiff, if there was no certificate from the judge " that there was good ground for making him a defendant;" yet in the case of *replevin* the defendant acquitted cannot have his costs, for replevin is not within the statute; for it is not mentioned; and statutes giving costs are to be construed strictly.

Before I conclude this chapter, it may be proper to take notice of some points which occur in this action.

1. Where the goods distrained have been cloigned, so that the sheriff cannot get at them to make replevin, in such case, the plaintiff may bring this action in the *detinet*, and after avowry pray that the defendant may gage deliverance. Bull. N. P. 32.

Or he may, upon a return of an *elongavit* to the *pluries* writ of replevin, have a writ to the sheriff, commanding him to take other beasts of the defendant in withernam; but if the defendant, before the return of the withernam, appears to the writ of replevin, and offers to plead *non cepit*, it shall stay the withernam, for the defendant shall not be concluded by the return of an *elongavit*; for the sheriff can make no other return, where he cannot find the things to be replevied. De la Bastie v. Reigald. Cas. K. B. 37. & 425.

2. Where the defendant has had judgment of *retorno habendo*, and the plaintiff again makes replevin, he does it by writ of second-deliverance, which writ is given by stat. *West.* 2. 13 Ed. 1. c. 2. under which writ the right again may be tried; but the statute further enacts, "That if the party replevying again makes default, or for any other cause, a return of the distress, now twice replevied, be awarded, the distress shall remain irrepleviscable." 4 Term Rep. 519.

## CHAPTER VIII.

## The Action of Trespass.

1. **TRESPASS**, in the most extensive sense, means any injury arising to another's person or property, from the misfeasance or act of another; and therefore, all such injuries, though they assume different names, in fact are actions of trespass; as assault and battery is a trespass to the person, &c.

The trespass which I shall here consider, is the Action properly so called, and includes only *injuries to the lands or personal property of another*.

In treating of this action I shall consider, 1. The nature of the action in general: 2. With reference to the things on which it is committed: 3. With reference to the person, viz. as committed by officers, or by private persons: 4. For what trespasss will not lie: 5. Who may maintain this action: 6. The pleadings: 7. The evidence: 8. The verdict, judgment, and costs.

## I. OF THE NATURE OF THIS ACTION IN GENERAL.

3 Black. Com.  
309.

1. "Every entry upon the land of another is strictly an injury, if done without the owner's consent, and at least does the mischief complained of in the writ: *that of treading, and beating down the plaintiff's grass*; for such injuries therefore this action lies."

*Ibid.*

But, however, in certain cases, the law has given a *right to enter upon the lands of another*: as if a man comes to execute legal process; to demand money; a landlord to distrain; a reversioner to see that no waste has been done; a traveller to get refreshment at an inn: all these are cases in which the law allows an entry, and so the entry is not a trespass.



So if a man makes a lease, excepting the trees, and he enters to shew them to a purchaser, he is not a trespasser. *Lifford's case.* 10 Co. 46.

2. "But where the law allows such entry, or any act to be done, if the person misdemanees himself, or makes an unlawful use of the authority so given, he shall be held to be a trespasser *ab initio*: for, from the subsequent act, the law judges *quo animo* the first entry was made." *Six carpenters case.* 8 Co. 146.

As if a person enters into a tavern, which every man by law has a right to do; yet if he steals any thing from thence, his first entry shall be deemed unlawful, and him a trespasser *ab initio*.

So where to trespass for taking a gelding, the defendant pleaded that he took him as an estray, and so justified. The plaintiff replied, that after the taking he had laboured and worked him. On demurrer it was objected; that the first taking being lawful, that the action should be *case* for the subsequent abuse; but it was resolved, that the subsequent abuse of the estray being unlawful, made the defendant a trespasser *ab initio*, and that so the action well lay. *Bagshaw v. Spencer.* Cro. Jac. 147. *Orley v. Watta.* 1 Term Rep. 12. S. P.

But where the plaintiff brought trespass for breaking and entering his house, and taking an excessive distress, it was adjudged, that this action would not lie; for the taking was lawful, and no subsequent abuse appeared to make the defendant a trespasser *ab initio*. *Lynne v. Moody.* 2 Stra. 851.

As the most frequent cases which occurred under this head, happened where goods or cattle had been taken lawfully for a distress, but from some subsequent abuse or mismanagement, the party was, according to the doctrine now delivered, made a trespasser *ab initio*, when in fact the first taking was lawful; this hardship was remedied by statute 11 Geo. 2. c. 19. which enacts, "That a distress for rent shall not be deemed unlawful, nor the party be deemed a trespasser *ab initio* for any irregularity in the subsequent disposition of it: But that the party aggrieved might recover full satisfaction for the special damage he shall have sustained thereby, and no more, in an action of trespass, or on the case, unless tender of amends has been made before."

Since this statute, *trover* will not lie for goods taken under an irregular distress, as tending to place the landlord in the same situation he was before the passing of the statute, by considering him as a trespasser *ab initio*. *Wallace v. King.* H Blackst. Rep. 13.

This statute therefore only affects the subsequent disposal of the distress: so that it seems that this action still lies for an unlawful taking; as if the distress had been made at night: So

Ca. Litt. 161.

So if of beasts of the plough, when other sufficient distress can be had: So if doors have been broke open to make it; for the outer-door can in no case be broke open, except under the direction of stat. 11 Geo. 2. c. 19. which impowers the party to do it "in the presence of a constable or peace-officer, oath being made before a justice, of there being good grounds to suspect that the goods intended to be distrained, have been conveyed away, and are contained in such house."

Francombe v.  
Pinche.  
Worcester Lent  
Ass. 1766. MSS.

But however, when trespass was for breaking and entering the plaintiff's house and taking his goods, and the case in evidence was, that the defendant having with him a constable, had entered the plaintiff's house to make a distress for rent; after he had told his business and begun to take an inventory, the plaintiff's wife tore his paper, beat him and the constable out, and then blocked up the door. About an hour after, the defendant with several others returned, and demanded admittance, which being refused, he broke open the doors. It was ruled by Just. Wilmot, That the distress having been lawfully begun and not deserted, and the defendant compelled to quit it by violence, that this was a recontinuance of the first taking, and so was lawful; though he could not when he first came have so broken open the doors.

Browning v.  
Dann.  
9 G. 2.  
Bull. N. P. 82.  
Cal. temp.  
Hard. 168.

But in case of a distress for rent, if the outer-door is open, the person distraining may justify breaking open an inner-door or lock to find any goods which are distrainable.

That statute applies to cases where distress is for rent; but a similar provision has been made in other cases. As by stat. 17 Geo. 2. c. 38. it is enacted, "That where any distress is made for money justly due for relief of the poor, that it shall not be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the warrant of appointment of overseers; or in the rate or assessments; or in the warrant of distress thereupon: Nor shall the party be deemed a trespasser *ab initio*, on account of any irregularity which shall be afterwards done by him; but the party grieved may recover for the special damage, unless tender of amends has before been made."

Charlwood v.  
Best.  
Westm. 1748.  
Bull. N. P. 82.  
Hutchings v.  
Chambers.  
2 Burr. 579.

And a warrant may be made to distrain before the time for which the rate is expired, and is good.

But though trespass may lie for taking beasts of the plough as a distress for rent, where other beasts may be had; yet in the case of distress for poor's rates, it is lawful to take them, though other distress may be had: For it is not properly a

common law-distress, but is rather in the nature of an *execution*; in which case there is no such exemption.

3. "Trespass *vi et armis* must always suppose a *misfeasance*; " for it will not lie for a bare nonfeasance, which as it sup-  
" poses no act, carries no trespass."

As if a person enters a tavern, if he steals any thing, he is a trespasser *ab initio* for the misfeasance; but for not paying for the wine he has had, no action of trespass lies. Six carpenters  
case.  
8 Co. 146.

4. "To constitute a trespass, the act causing the injury " must be *voluntary*, and with some degree of fault; for if  
" done involuntarily and without fault, no action lies."

4 Barr. 2092.

As here, in trespass for chasing the plaintiff's sheep, the case was, that the plaintiff's sheep being trespassing on the defendant's ground, the defendant chased them off with a dog; which dog *had followed them into the plaintiff's own ground*, for which this action was brought, but was held not to lie; for the defendant might justify chasing the sheep off his ground, and as the dog could not be suddenly called in, the trespass and injury was involuntary; it appearing that the defendant had called the dog in when off his ground. Mitton v.  
Faudrye.  
Poph. 161.

But where the defendants were out with dogs and guns, and coming on the plaintiff's ground adjoining to his paddock, one of their dogs killed one of the plaintiff's deer: it appearing that they were not in any pathway or road, the injury proceeded from some degree of fault, and could not be said to be an accidental and involuntary trespass; so the plaintiff had judgment. Beckwith v.  
Shordike &  
Hatch.  
4 Burr. 2092.

"And on the same foundation, though the injury has pro-  
" ceeded *from mistake*, this action lies; for there is some fault  
" from the neglect and want of proper care."

As where the trespass laid was for cutting the plaintiff's grass, and carrying it away: The defendant pleaded that his land adjoined that of the plaintiff, and that *by mistake* in cutting his own grass, he had cut part of the plaintiff's, which was the trespass, &c. and tendered amends. The plaintiff demurred, and had judgment; for it appeared that the fact was voluntary, and through some degree of fault, and his intention and knowledge are not traversable. Bafely v.  
Clarkson.  
3 Lev. 37.

4. "Property alone without possession will not enable the party to maintain trespass."

For where the plaintiff being landlord of an house, let it ready furnished to Lord Montfort, and the lease contained a schedule of the furniture; an execution having issued against Lord Montfort, the defendants, who were the sheriffs of Middlesex, Ward v. Ma-  
cauley & al.  
4 Term Rep.  
489.

*Middlesex*, seized, under the execution, the goods in question, which were part of the furniture so contained in the schedule: It was decided, that the action should have been trover, and that trespass would not lie, this action being founded on possession, which was necessary to maintain it, though a constructive possession, as where the goods were lost by a carrier or servant, might be sufficient to maintain it.

3. These are the *general grounds* of this action: the more particular cases in which it is maintainable, are now to be considered with reference to the things on which the action may be committed; and to the person.

## 2. OF TRESPASS, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

These are, 1st, Injuries to the rights of tenants: 2d, To the land from damage feasant: 3d, To the rights of fishery: 4th, To the rights of tolls and customs: 5th, To markets and fairs: 6th, From hunting, or pursuit of game: 7th, To highways.

### I. OF INJURIES TO THE RIGHTS OF TENANTS.

*Herlakenden's case.*  
4 Co. 62. a.

1. If there is lessee for life or years of lands, the lessee has no property in the trees growing on the land, and even if the clause in the lease is without impeachment of waste, it gives no property, but is merely an exemption from an action. Yet if a stranger cuts any down, the lessee may maintain trespass, but he shall not recover damages for the *value of the trees*, because the property of them is in him in reversion; but the damages shall be for *cropping and breaking his close, and perhaps for the loss of shade, &c.*

*Ld. Montague v. Shepherd.*  
Cro. Eliz. 5.

So by common law, though tenant for life or years is intitled to house-bote, hedge-bote, &c. yet a *copyholder* is not; and if he takes trees for that purpose, he is a trespasser: but he may have such right by custom of the manor.

2. Another case in which *tenants for life, years, or at will*, are liable to, or may have an action of trespass, is in the case of the *emblemments or crop growing on the lands, on the determination of their estates.*

“As to which it is a general rule, That where the estate is of an uncertain duration, that there the tenant shall be intitled to the emblemments.”

Co. Litt. 35.

Therefore, if a man is *tenant for life*, and sows the land but dies before harvest, his executors shall have the crop.

So if a man is tenant *per auter vie*, and *cestui que vie* dies. The land being sown, the tenant *pur auter vie* shall have the emblements on the same principle, the estate being determined by the act of God.

So where the estate is determined by act of law, it is the same: as if a lease be made to a man and his wife during coverture, and the husband sows the land, and afterwards, by sentence of the spiritual court, the marriage is dissolved, the husband shall have the emblements; for the sentence was *in iuratum*, and the act of law.

"But where the estate for life is determined by the act of the lessor himself, there he shall not have the emblements." Ibid.

As where a woman tenant *durante viduitate* sows the land, and afterward took husband, whereby her estate was determined by her own act, it was determined that the lessor should have the emblements. So if the lease is till lessee commits waste, if he sows the land and commits waste, he shall not have the emblements; for the determination of the estate was by his own act. Oland's case. 3 Co. 116. a.

But if the lessor who is tenant for life, determines his estate by his own act, his lessee shall not lose the emblements, though the lessor would, because that to bar the lessee the forfeiture must have arisen from his own act. Cro. Eliz. 461.

The case is the same of leases at will; for if lessee at will sows the land, if the lessor determines his will, the lessee shall have the emblements; but if the lessee at will himself determines it, he shall not have them, for it was his own act. Per Popham. Cro. Eliz. 461.

So if a man makes a lease at will and the lessor is outlawed, by which his estate is determined, yet shall the lessee have the emblements; but if the lessee himself had been outlawed, by which his will is determined, the King shall have the emblements. Co. Litt. 556. 5 Co. 116. b.

"But where the estate is of certain duration, as a lease for years, if lessee in such case sows the land, and his term is ended before the corn is ripe, in such case the lessor, or he in reversion, shall have the crop, and not the tenant; for the lessee knew when his term would end." Litt. § 68.

But though this rule is general, yet it admits of certain exceptions arising from the custom of the country.

As where the plaintiff brought an action of trespass for sowing and taking away a crop of corn, and relied on a custom, Dougl. 190.

custom, that "the tenant for any term of years which expired on the 1st of May, might, after the expiration of his term, take and carry away, as his waygoing crop, all the corn then growing on the land at the time the term expired." This custom was adjudged to be good and reasonable, though contended that the lessee could not claim it against his deed, by which the land had been demised for a certain number of years, then expired.

Beaver v.  
Delahay & al.  
H. Black. Rep. 5.

So a custom that the tenant might leave for a certain time his waygoing crop in the barns of the farm, which he had left after the determination of his term, and after his quitting the premises, is good; and the corn so left may be distrained, even though six months are expired from the end of the term.

Litt. § 68.

"In these cases, therefore, where either party is intided to the emblements, he may have trespass for any molestation in taking and carrying them away; and he is also intided to free entry, egress and regress, to cut and carry the crops away."

3. "Trespass or trover will lie for taking goods which are not the objects of distress."

4 Term Rep.  
561.

Five things by common law are not distrainable: 1st, Things annexed to the freehold: 2d, Things delivered to persons exercising their trade; as cloth to a tailor, &c.: 3d, Corn, hops, &c. growing: 4th, Instruments of tillage or trade; as beasts of the plough, &c.: 5th, Instruments of trade while in use (*Co. Litt.* 47.) As to the first and second, they are privileged still; and corn is distrainable now by virtue of stat. 2. W. & M. 5.

Francis v. Wyat.  
3 Burr 1498.

As to others, they are privileged *sub modo*; and as to these it has been decided, 1st, That a chariot of a stranger standing at a livery-stable, was not privileged from distress; but that it might be distrained by the landlord of the livery-stable for rent-arrear.

Gorton v.  
Faulkner.  
4 Term Rep.  
505.

2. That implements of trade (as in this case three weaving looms) might be distrained for rent, if there was no sufficient other distress then to be had on the premises.

Simson v.  
Harcourt.  
Mich 18 G. 2.  
C B cited by  
Fuller Just.  
4 Term Rep.  
568.

3. But if such implement of trade be in actual use (as in this case, where the plaintiff's apprentice was weaving, and the loom was distrained) that such cannot be distrained.

## 2. OF INJURIES FROM THINGS DAMAGE FEASANT.

1. "Where an injury has been done by the cattle or goods of any one to the lands of another, he who receives the injury may either distrain them damage feasant, or bring his  
"action

"*action of trespass, quare clausum fregit, and recover for the damage sustained.*"

"But he should make his election of his remedy; for if he distrains, and the distress escapes, the action of trespass is gone, unless the escape was not through his fault or neglect."

For where the plaintiff declared in trespass *quare clausum fregit*, the defendant pleaded, that the plaintiff had *distrained* his hog damage feasant, which was the same trespass: the plaintiff replied, *that the hog escaped without his consent*, and that he was yet unsatisfied of the damage. The defendant demurred, and had judgment; as it did not appear that it was *without his fault*, as he had only pleaded that it was *without his consent*. Vasper v. Eddowes. Salk. 248.

But if the distress *dies* in the pound, the action of trespass *ibid.* is restored; for such is the act of God, which shall not deprive the party of his remedy.

2. "He who has the care, custody, or possession of the cattle who do the damages, is liable to this action."

As if *agisted cattle* break into another land, the agister is liable to the damages: So if the hogs of *A.* were put into the yard of *B.* and they break into *C.*'s land, action lies against *B.* even though *A.*'s servant watched them; and so the owner had a special possession. Dawtry v. Huggins. Clayt. 33. Tri. p. Pais 201.

### 3. OF INJURIES TO THE RIGHTS OF FISHERY.

As to this it has been decided,

1. A man may have a proper and several interest as well in a fishery as in water, or a river; for a man may grant *aquam suam*, and the fishery shall pass. Case of the Royal fishery of the river Bann in Ireland. Dav. Rep. 149.

2. The sea belongeth to the King; and also every navigable river, so high as the river ebbs and flows, is a royal river; or so far it is considered as a branch of the sea, and belonging to the crown: but rivers not navigable are the property of the proprietors of the lands on both sides the river; that is, if both sides belong to one owner, the whole river is his; if to two persons, the river is in moieties. But in the case of the crown, there is a difference in respect to granting the land from that of a subject; for by a grant of the land in the case of a subject, the fishery would pass; but in the case of the crown, by a grant of the land adjoining a navigable river, or royal fishery, the fishery would not pass, for it is an inheritance in gross in the crown, and parcel of the inheritance of

the crown itself; but it may be specially granted by grant of the fishery from the crown.

Same case.

Upon these grounds the several distinctions of the rights of the fishery are formed, viz. free fishery, several fishery, and common of fishery.

1. As to a *free fishery*, it is the exclusive right of fishing in a navigable river or arm of the sea; and this must be claimed by prescription, or grant from the crown; for

S. C. and Warren v. Matthews.  
Salk. 137.  
2 Black. Com. 139.

The right of fishing in navigable rivers is common to all the king's subjects; and therefore an exclusive right must be derived from the grant of the crown, in whom that exclusive right originally resided. But the prescription should be as old as the reign of Henry II.; for the charters of king John and Henry III. avoid all such grants from the beginning of the reign of Richard I. and prohibit the fencing of rivers in future; so that no grant of a free fishery shall be good, if made since that time.

2 Black. Com. 139.

2. This is also the same of a *several fishery*, which is also an exclusive right derived in the same manner, but with this additional circumstance, that it should be claimed by a person who owns the soil, as the land adjoining to a navigable river; and it was accordingly held to be good where the plaintiff in this case claimed a several fishery in the river Severn, where it was navigable, as part of his manor of *Arlingham*, which adjoined the river; and recovered accordingly.

Carter v. Murcot.  
4 Burr. 2162

Per L. Mansfield.  
6 Burr. 2817.

"But it is not necessary to constitute a *several fishery*, that all other persons should be excluded; it is sufficient that no person shall have a *co-extensive right*; for a partial right, as to take for a particular purpose, does not destroy the nature of a several fishery."

Seymour v. Id. Courtney.  
5 Burr. 2814.

As where the plaintiff was grantee of a several fishery, but the grantor had reserved to himself the oysters and fish for his own table; and having declared as possessed of a *several fishery*, the judge nonsuited him, deeming the right so reserved to the grantor as destroying the nature of a several fishery, which he supposed should be *exclusive* of all others. But the court of King's Bench set aside the nonsuit, holding the doctrine as before delivered by Lord Mansfield.

Warren v. Matthew.  
Salk. 137.  
Anon.  
1 Mod. 108.

But where a man claims such free or several fishery, he must shew his title, and the *onus* lies on him; for the claim is derogatory to the common right of the subject.



## TRESPASS.

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And he who has either of those species of fishery may have Smith v. Kemp.  
trespass for taking the fish, for he has a property in them. Salk. 637.

3. Common of *Piscary* is a right of fishing in the waters of another, in common with others; and it differs from a several fishery, that in this last the owner has a property in the fish before they are caught; but in the case of common of *Piscary* not till they are taken.

### 4. OF INJURIES OF THE RIGHTS OF TOLLS AND CUSTOMS.

Where goods have been distrained for tolls or customs, the person whose goods have been so distrained may bring this action for the taking, in which the right to the tolls is tried. But the cases under this head have already been treated of in the action of *Replevin*.

So for unlawful taking of any thing for an amercement in a court leet.

### 5. OF INJURIES TO FAIRS AND MARKETS.

1. Every one of common right has a liberty of coming to buy and sell without paying any toll, &c. unless due by custom or prescription. But if a person requires any particular easement, as a stall, he must have the licence of the owner of the soil: for the property of the soil still remains in the owner of the land, and he dedicates it no farther to the use of the public than the right of entry to buy and sell. This right therefore of erecting a stall for exposing things to sale in a market or fair, is called a Stallage, and is a sum which the owner of the soil has a right to for his permission. If the ground is broken, it is called Picage.

Mayor of Northampton v. Ward.  
1 Will. 107.  
2 Stra. 1239.

If any person therefore comes into a market and raises a stall without the owners of the soil's leave first obtained, this action lies against him, for he is thereby a trespasser.

And it should seem that trespass is the only action; for it is said (*Stra. 1238.*) that debt or assumpsit would not lie for the sum due: and it is decided in this case, that goods brought to a market cannot be *distrained* damage feasant.

Mayor of Launceston's Case. Cro. Eliz. 75. & Cro. Eliz. 628. 8 P.

2. So this action lies for erecting tables upon which wares are exposed to sale; for it is an use of the soil which belongs to the owner, and similar to stalls in the use made of them.

Mayor of Norwich v. Swann.  
2 Black. Rep. 1116.

## 6. OF INJURIES FROM HUNTING, OR THE PURSUIT OF GAME, &amp;c.

As to which these decisions have taken place:

Gaulth v.  
Myrns.  
Cro. Jac. 321.

1. Any person may *justify going* upon the lands of another *in pursuit of ravenous beasts*, as foxes, badgers, &c. but it will *not justify a person to break the ground or dig* for them: for the taking of them is of public benefit.

Gaudry v.  
Feltham  
Trin. 26 Geo. 2.  
Term Rep. 334.

So it will not justify any excessive or unreasonable damage to the land of another, for the justification is only as to the *following*, and should be done with as little damage as possible. And therefore if to trespass for such cause, the defendant justifies as following a fox or such beast, and in fact has committed unnecessary mischief, the plaintiff should make a new assignment of the excessive and unnecessary injury.

2. By statute 22 & 23 Car. 2. c. 26. gamekeepers, properly nominated, or other persons (authorised by warrant from a justice of peace) may search for and seize instruments for destruction of the game.

Under this statute it has been held,

Carpenter v.  
Adams.  
Comb. 183.

1. That gamekeepers in making a search, should have a justice's warrant, founded on an information.

Rogers v.  
Carter.  
2 Will. 387.

2. A gamekeeper, properly appointed, has a right to *keep and carry a gun or other instrument to take game anywhere*, but a right to *kill only on his own manor*. Therefore where the plaintiff who was a gamekeeper, had followed the game off his own manor, and the defendant took his gun from him, trespass was held well to lie; for he was intitled by law to keep it, though he had been liable to the penalty for killing game off the manor.

3. By stat. 9 Ann. c. 25. a lord of a manor shall appoint but one gamekeeper, and by stat. 3 Geo. 1. c. 11. the person so appointed should be either a person qualified himself, or a menial servant of the lord, or appointed and employed to kill game for the sole use of the lord.

Per Cur.  
3 Will. 389.

This clause does not prevent the lord of a manor from appointing any person as his gamekeeper, though neither qualified, nor a menial servant: for the statute never meant to take from lords of manors living at a distance, the power of appointing a person to kill game for their use,

## 7. OF INJURIES TO HIGHWAYS.

Sir John Lade  
v. Shephard.  
3 Stra. 1004.

By setting out an *highway*, the owner does not part with the property of the soil. And therefore where the defendant owned

owned land adjoining to the highway, which was the soil of the plaintiff, but separated by a ditch, and he laid a bridge over the ditch to the highway, it was held that, The plaintiff might have trespass for it; for the soil was appropriated only to the purpose of an highway, and it was not lawful to use it in any other manner, as the defendant had done.

### 3. OF TRESPASS WITH REFERENCE TO THE PERSON.

That is, 1st, As committed by *officers*, or persons entrusted with some authority by law: 2dly, *By private persons*.

Injuries by officers, are, 1st, By the sheriff and his officers: 2dly, By justices of peace: 3dly, By officers of the excise or customs.

#### 1. OF TRESPASS AGAINST THE SHERIFF OR HIS OFFICERS.

1. Where the *subject matter of any suit is not within the jurisdiction of the court* applied to for redress, every thing done is absolutely void, and the officer executing the process is a trespasser. But where the subject matter is within the jurisdiction of the court, but the want of jurisdiction is to the person or place, unless the want of jurisdiction appears on the process to the officer who executes it, he is not a trespasser, *Terry v. Huntington. Hard. 480. Case of the Marshalsea. 20 Co. 76. a. b.*

But in the case of constables, a particular exemption is given by stat. 24 Geo. 2. c. 44. which enacts, "That no constable shall be answerable for obeying a justice's warrant, notwithstanding any defect of jurisdiction in the justice who issued it."

2. If judgment is vacated as unduly obtained, and restitution awarded (as where the writ of execution was made returnable on the effoign-day, the suit being by bill, in which case the execution was set aside, and the goods ordered to be restored) the defendant in the first action may bring trespass against the plaintiff for taking the goods; for by vacating the judgment, it is as if it had never been; but it is otherwise of a judgment reversed for error, for then no action lies, for it is the fault of the court; but an irregular judgment is the fault of the plaintiff, or his attorney. But in such case of an irregular judgment, no action lies against the officer, for he is justified by the writ. *Turner v. Felgate. 1 Lev. 95. 1 Sid. 272. Adams v. Sperry. 1 Will. 155.*

2 Will. 384.

So that the rule as to justification under process of any court is, That if the court has jurisdiction, but their proceedings are irregular, trespass lies against the plaintiff in the action for taking the goods, but not against the officer: but if the court has not jurisdiction, the officer is liable.

Sanderfon v.  
Baker & Martin.  
2 Black. Rep.  
832.  
3 Will. 309.  
S. C.  
Ackworth v.  
Kemp.  
Dougl. 41. S. P.

3. If a *fiery facias* is directed to the sheriff to take the goods of a person in execution, and he directs his warrant to his bailiffs for that purpose, *if they take the goods of another person by mistake, trespass lies against the sheriff*; for he is liable for the acts of his officers acting under colour of his authority.

As it therefore often happens that the goods of a person against whom a *fiery facias* is expected, are conveyed away, or transferred by bill of sale; how far the property remains in such case, is settled by the *Statute of Frauds*, 29 Car. 2. 5.

Cro. Eliz. 174.  
Id. 440.

By the common law the goods of the defendant were bound from the time of the writ, and therefore if the defendant had aliened his goods after, or on the day of the teste of the writ of execution, the sheriff might take the goods in the hands of a purchaser. It was therefore enacted by that statute, "That the goods should not be bound from the teste, "but from the delivery of the writ to the sheriff, who is to "indorse, on receipt of it, the day and month on which he "received it."

Per Hardwick,  
Ch.  
2 Eq. Caf. Abr.  
381.

1. Under this statute it has been held, That neither before the statute of frauds nor since, is the property of the goods altered, but remains in the defendant *till execution executed*: and the meaning of these words, That the goods shall be bound from the delivery of the writ to the sheriff," is, That after the writ is so delivered, if the defendant makes any assignment of his goods, *except in market overt*, or by becoming a bankrupt, which is an assignment in law, the sheriff may take them in execution.

Comb. 145.  
Anon.  
2 Vent. 218.  
S. P.

2. This statute relates only to protect the goods in the hands of *purchasers*; that is, to cases where the goods are *fold bona fide*; for if the party dies after the teste, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for such is not a change of property by sale, or for a valuable consideration.

Per Lord Holt.  
Lord Raym.  
252.

3. So if a writ of execution is delivered to the sheriff, and *the defendant becomes a bankrupt before it is executed*, the execution is thereby superseded, and the goods not bound by the delivery, for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed.

" But

"But in such case the sheriff shall not be made a trespasser by relation, for any subsequent disposal of them; though he would be subject to an action of trover."

For where the goods of a trader were taken in execution, after an act of bankruptcy committed by the defendant, who was sheriff, but before the sale the commission was sued out, and a provisional assignment made, of which he had notice, but notwithstanding, he sold the goods; *this action* was held not to lie, though trover might; for the *taking* was rightful and legal, and the conversion only unlawful, he having had notice that the property was changed. *Smith v. Milles*, 1 Term Rep. 475.

4. So the statute extends not to bind the king, for he is not named; and by statute 33 H. 8. c. 39. If the king and a subject have both actions against the same person, the king's execution shall have place, provided his suit was commenced at any time *preceding* the judgment given for the other person; and therefore the goods are liable in such case, in whose handssoever they be. *Post ch. of Trover*, vid. for constructions on this statute.

5. But though possession be regularly taken of goods, yet the officer must remove them to a place of safe custody, in a proper time; for where he kept possession of them on the premises, under an attachment from an inferior court, for an unreasonable length of time, viz. six months, he was held to be a trespasser *ab initio*. *Reed v. Harrison*, 2 Black. Rep. 1218.

6. It is not lawful for the sheriff, or his officers, to break the house of any person to execute process of *fi. fa.* against the goods, or *capias* against the person, at the suit of a subject; and if the sheriff or his officers do so, he is a trespasser, and liable in this action. *Swayne's case*, 5 Co. 91.

But this privilege is only confined to the person or goods of the owner of the house, or such as are brought there, without fraud or covin, and therefore shall not protect the person or goods of any other which are brought there to prevent a lawful execution; and therefore in such case, *after denial and request*, the sheriff may break doors to do the execution. But in such case a demand of the delivery of the goods is necessary, for if he breaks the house without making such demand, he is a trespasser.

7. Things fixed to the freehold cannot be taken in execution, and therefore for such taking trespass will lie. *Day v. Bisbitch*, Cro. Eliz. 374.

8. A *feri facias* is *de bonis & catallis debitoris*, and therefore under it the debtor's goods only can be taken in execution. But a *levari facias* is *de exitibus terræ*, and therefore under it the sheriff may take the cattle of a stranger *levant and couchant*, *Buller N P. 91*, *Britton v. Cole*, Salk. 395.

for

for they are the issues of the land (*St. West. 2. c. 32. 2. infl. 433.*) and the land is debtor. And such is the case of tenants in common, or commoners; for their cattle may be taken on the land, unless their title be found by inquisition, or till avoided by *monstrans de droit*. The law in this case is the same as if the taking was under an outlawry.

## 2. OF TRESPASS AGAINST JUSTICES OF PEACE, OR PERSONS ACTING UNDER AUTHORITY FROM THEM.

1. These are also subject to this action, if by any illegal proceeding they take the goods of any person. But as to justices of peace, it is enacted by statute 27 *Geo. 2. c. 20.* "That in all cases where a justice of peace is empowered by an act of parliament, made or to be made, to issue a warrant of distress, it shall be lawful for him in such warrant to order the goods distrained to be sold within a certain time limited by such warrant, so that it be not less than four nor more than eight days, unless the money for which the distress was made, and all charges, be sooner paid."

*Padfield v.*

*Cabbell.*

*Tr. 16, 17 C. 2.*

*C. B.*

*Buller N.P. 83.*

And note, That a warrant *ex vi termini* only means an authority; therefore if under the hand of a justice, it is sufficient, without being under seal, unless particularly required by act of parliament.

2. "A constable to whom a warrant is directed must act within his district, or he shall be liable to an action of trespass."

*Blatcher v.*

*Kemp.*

*2 H Black Rep.*

*15.*

To trespass for entering the plaintiff's house, the defendant justified under a justice's warrant to search for nets: the warrant was produced, and appeared to be directed "to the constable of *Shipborne*, *Samuel Carter*, and to all other officers of the peace of the county of *Kent*;" evidence was given, That the defendant was boroughholder of *Little Peckham*, which adjoined to the hundred of *Shipborne*, in which the plaintiff's house was: it was contended for the defendant, that he was a constable for the county, and came under the general direction of "All officers of the peace of the county of *Kent*:" but it was resolved, That these words were to be taken *radendo singula singulis*; that is, That each constable should act within his own district, and could not act by law out of it, without being a trespasser.

3. The third case of actions against officers, are those founded on the revenue-laws.

### 3. OF TRESPASS AGAINST OFFICERS OF THE EXCISE OR CUSTOMS.

1. By statute 13 & 14 Car. 2. c. 11. § 5. "Any person authorized by writ of *assistance* out of the court of *Exchequer*, may (taking a constable or other officer with him) *in the day-time* enter any house or place; and in case of resistance, break open doors, chests, or packages, and seize any uncustomed goods he shall find there."

1. Under this statute it has been held, That trespass lies against custom-house officers for entering the house of any person to search for smuggled goods, *if none are found*, for the officer does it at his peril. 2. Though the officers have a writ of assistance, yet if *they have no constable with them*, they are trespassers even if smuggled goods have been found. 3. And though they have with them a constable, yet *if he was not constable of the place where the search was made*, they are trespassers.

Bruce v. Rawlins.  
3 Will. 61.  
Redshaw v. Brook.  
2 Will. 405.  
S. P.

"And no custom-house officer has a right to seize goods liable to duty before they are landed, or offered to sale."

For where the plaintiff's ship, lying in the *Thames*, with butter on board from *Ireland*, the defendant, a custom-house officer, went on board, and *before the hatches were opened or bulk broken, or any goods landed or offered to sale*, seized the butter as contraband: the court were on a case reserved all of opinion, That the seizure was unlawful, as the goods had not been landed or exposed to sale; and they grounded their opinion on stat. 18 Car. 2. 2 & 20 Car. 2. 7.

Smyth v. Reynolds.  
2 Will. 257.

2. In searches by excise officers for goods which have not paid the duty, *by night*, the presence of a constable or peace-officer is required by statute 8 Ann. c. 9. and stat. 10 Ann. c. 19. § 12.

Where such searches are made by excise-officers, the constable or peace-officer must *be of the place* where the search is made; it is not sufficient that the person accompanying them is an officer by reputation. As here, where it appeared that the person had formerly been headborough of a parish, and had a board over his door with that name on it, but was out of office, and was by mistake applied to by the excise-officers in their search, they were adjudged to be guilty of trespass.

Hill v. Barnes.  
2 Black. Rep. 1735.

3. Though an officer proceeds regularly in the seizure of goods, yet it depends on the condemnation, whether the taking shall

Legg v. Champante.  
2 Stra. 320.

shall be deemed legal or not; for if the goods are not condemned, he is a trespasser.

*Dobson v. Saunders.*  
3 Will. 434.

By statute 10 Geo. I. § 13. c. 10. power is given to officers of excise to search at all times of the day entered warehouses or places for tea, coffee, &c. But private houses can only be searched, on oath of the suspicion before a commissioner or justice of peace, who can by their warrant authorize a search. Under such a warrant obtained by the officer, on his own oath of suspicion, if a search is made in a private house, and no goods found, the officer is liable to an action of trespass, and the warrant shall be no justification; for the commissioners have no power to inquire into the circumstances, and the officer takes the whole on himself.

*Doot v. Cooper & al.*  
1 Term Rep. 335.

But this case has been since over-ruled, and it was in this case decided, That in an action of trespass against an officer of excise, for entering the plaintiff's house under a warrant of two commissioners founded on stat. 10 Geo. I. c. 10. to search for concealed goods, *but none were found*, that the *defendants were not trespassers*, the act itself being legal; but that the only remedy was by an action on the case, for obtaining and executing the warrant from bad motives.

*Scott v. Shearman & al.*  
3 Black. Rep. 977.

4. But a condemnation of the goods seized *in the Court of Exchequer* is so conclusive, and alters the property so effectually, that neither trespass nor trover will after lie against the officer; for if an action would lie against the officer, the goods being bound by the condemnation, the judgment against the goods would be defeated by suing the officer.

*Horne v. Boofey.*  
1 Stra. 952.

"Though it should seem that this is only in the case of *officers* seizing within their own department;" for where a person not the proper officer made a seizure, he was held liable to this action, though the goods had been condemned.

*Henshaw v. Pleasance.*  
3 Black Rep. 1174.

But a condemnation of the goods is only conclusive evidence in favour of the officer, *when it is made in the Court of Exchequer*, and does not extend to any other condemnations by inferior jurisdictions, as the boards of excise and customs. For in this case, after a condemnation by the board of excise, the owner of the goods recovered in trespass against the officers, and their sentence was adjudged not to be conclusive evidence.

5. Where



Where goods are seized, the question often turns upon whom the *onus probandi* the payment of the duty lies.

Before the statute 6 G. 1. c. 21. if an officer went into a trader's house to make a search, an action lay against him for the trespass, unless he could prove that the goods therein were forfeitable. It was therefore provided by this statute, "That the officer should be protected who acts *bona fide*, and on probable presumption, even though he mistakes in the following cases: 1. Where goods are on board a boat, without an officer. 2. Where they are coming by the water-side. 3. Where there is credible information. In all cases of seizure under these circumstances, as the officer is not liable to an action, the owner may apply to the commissioners, who, on proper circumstances appearing, will restore the goods. If the owner does not apply, the officer proceeds to condemnation in the *Exchequer* by prosecution; and in such case, by sect. 41, the proof of the payment of the duties lies on the owner, who claims them in the *Exchequer*." This clause confining the mode of proof only to cases where application had been made to the commissioners, was made general by statute 12 G. 1. c. 28. section 8. which enacts, "That in all cases where foreign goods are seized for non-payment of duties, &c. and any dispute shall arise thereon, the proof of payment shall lie on the owner or claimer of the goods, and not on the officer who has made the seizure."

These statutes relate only to suits for condemnation in the *Salomon v. Exchequer*; but in actions of trespass, brought by the owner of the goods against the officer, the proof of the non-payment lies on the officer who seized the goods.

The seizure in the last case was of goods for non-payment of the *Custom-house duties*; but the same doctrine was held in the present case, on a seizure for non-payment of the duties of excise, viz. that the *onus probandi* the non-payment of the duties, lay on the officer.

By statute 10 Geo. 1. c. 10. the proof of payment of the excise-duties on tea, coffee, and chocolate, is laid on the owner or claimer in the *Exchequer*; but it extends not to actions of trespass.

And the same proof lies on the owner or claimer in the case of seizure of soap and candles, by statute 23 Geo. 2. c. 21. which also relates only to informations in the *Exchequer*.

6. By statute 17 Geo. 2. "all actions against revenue-officers for any thing done in execution of their office, must

" must be brought within three months after the offence committed, and be laid in the proper county where the fact happened."

**Ballard v. Whitfield.**  
Per Lord Loughborough.  
Guldh. Pasc.  
27 G. 3.

But though the writ has been sued out in a county where the offence was not committed, yet if plaintiff declares in the county where it was committed, it is good within the statute.

7. By stat. 19 Geo. 2. 34. *sect.* 16. it is enacted, " That if the judge certifies on the record that there was probable cause for such seizure, that in that case, beside the plaintiff's ship and goods so seized, or the value of them, he shall not be entitled to above two-pence damages, and no costs."

Under which statute it has been held,

**Sullivan v. Montague.**  
Douglas 102.

1st. That this certificate may be given at any time after the trial. 2dly, That if a sentence which was in favour of the captor, is afterwards reversed in a superior court, and then the owner brings this action against the captor, a certificate from the judge of the superior court of appeal is good within the statute.

**Baldwin v. Tankard.**  
H. Blackst.  
Rep. 28.

By stat. 23 Geo. 3. a like power is given to the judges to certify where the seizure has been under *the excise laws*, " But it was in this case resolved, That the judge could only certify where the action was for the seizure of the goods, not where it was for other injuries accompanying the seizure." As where it was for breaking and entering the plaintiff's house, breaking his locks, and seizing the goods; it was resolved, That the judge's certificate of probable cause should not deprive the plaintiff of his full costs.

**Entick v. Carrington.**  
2 Will. 275.

4. A general warrant from a secretary of state to seize the person, papers, &c. of any one is illegal; and this action will lie against the messengers acting under it, for entering into the plaintiff's house, and seizing his papers.

## 2. OF TRESPASS AGAINST PRIVATE PERSONS.

**Perkins v. Proctor & al.**  
3 Will. 381.

1. Trespass lies at the suit of a person against whom a commission of bankruptcy has been sued, he not being an object of the bankrupt laws, against the assignees under the commission, for taking possession of his house, goods, &c. for the commission is void, and of consequence the taking is without authority; and the person whose property has so been invaded, is intitled to a remedy: for every man should in applying to courts of limited jurisdiction know their extent, and jurisdictions are circumscribed: 1st, With regard to

to place; as a leet or corporation: so that the cause of action must arise within them. 2dly, With regard to the *subject matter*; as questions on excise. 3dly, With regard to *persons*; as in the case of the *Marshalsea*: so in the present, the person declared a bankrupt not being an object of the bankrupt laws, is not within the jurisdiction of the commissioners. And in all these cases where the court hold cognizance of matters not within their jurisdiction, their proceedings are void, as *coram non iudice*; and trespass lies either against the officer (as before) or against the person who applies to their jurisdiction, and acts under their decisions.

Hard. 480.  
Case of the  
Marshalsea.  
10 Co.

2. *Search warrants*, if issued on proper application, are legal, but must issue under these restrictions: as, 1st, There must be an oath: 2. The grounds declared: 3. It must be executed in the day-time by a known officer: 4. In the presence of the party informing. And though all these precautions be observed, the person on whose suggestion and information the warrant issued, is liable to an action of trespass if nothing is found, for breaking and entering the house, for he is justified or not by the event: but it shall at all events justify the justice who grants the warrant, and the constable who executes it, for it is granted on oath.

Hale's P. C.  
150.

3. By statute 6 Ann. c. 18. "Guardians, trustees, husbands seized in right of their wives and tenants *per auter vie*, holding over without consent, after determination of their interests, are made trespassers."

5. If a *lunatic* commits a murder or felony, he shall not be punished; for it must be done *animo felleo*: but if he commits a trespass, either to the lands or goods of another, this action will lie.

Weaver v.  
Ward.  
Hob. 134.  
Arg.

#### 4. FOR WHAT INJURIES TRESPASS WILL NOT LIE.

1. "Trespass will not lie against a *mere ministerial officer for any thing done merely in pursuance of his duty*, though it is somewhat in support of a wrong, but a wrong to which he is no way necessary or assenting."

As where a distress was tortiously taken, and impounded in the pound, of which one of the defendants was keeper, and an action was brought against those who took the distress and the pound-keeper jointly. The action was held not to lie against him, for he acted merely ministerially, and was no way concerned in the tort.

Badkin v.  
Powell & al.  
Cowp. 476.

But

a. c.

But it was further the opinion of the court in this case, That if he had *exceeded his duty and assisted in the wrong*, that he would be a party in the trespass; and that then an action would lie against him.

2. By stat. 1 & 2 P. & M. c. 12. "No distress shall be driven out of the hundred, except it be to a pound overt within three miles of the place where taken, and in the same shire; neither shall distresses be impounded in different places, under penalty of one hundred shillings, and treble damages."

Gimbart v.  
Pelah.  
2 Stra. 1272.  
Woodcroft v.  
Thompson.  
3 Lev. 40.

If the person distraining impounds the cattle in another county, he is not a *trespasser*, for the taking was lawful; but it subjects him to the penalty of the statute 1 & 2 Philip & Mary, c. 12. or an action on the case on the statute of *Marlbridge*.

Lynne v.  
Moody.  
2 Stra. 851.

3. So trespass will not lie for taking an *excessive distress*; for trespass will not lie where the first entry or taking was lawful, as here rent being due, and there being no subsequent abuse, the remedy should be a *special action founded on the stat. of Marlbridge, chap. 4.*: for at common law a man might take a distress of more value than the rent, as it was but in the nature of a pledge.

Aleyn 83.

4. "Trespass, *vi et armis*, does not lie against *lessee* for years for cutting down timber trees, and carrying them away, and selling them;" but if after having cut them, he suffers them to lie, so as to give time for the property of the divided chattel to settle in the lessor, there trespass will lie, for it is not one continued act; and besides that, lessee for years has a special interest in the trees for repairs and shade: but if the lease had been with an exception of the trees to lessor, there if lessee cuts them he is a trespasser, like as lessee at will, against whom trespass will lie for cutting trees; for such acts determine his will. But as against tenant by sufferance, lessor cannot have trespass before entry.

Herlakenden's  
case.  
4 Co. 62.

Litt. f. 71.  
Co. Litt. 57. a.

Glenham v.  
Henby.  
2 Lord Raym.  
739.

But even though the trees are excepted in a lease for years, yet if they are *destroyed or spoiled by lessee's cattle* breaking or topping them, no action of trespass will lie, for the defendant had the use of the soil, and the injury was done in the enjoyment of that to which the defendant had title, and without his fault.

5. "Wherever the law allows an entry on the land of another for a particular purpose, *as being for the good of the public*, trespass will not lie."

As

As is the case of *highways*, which if they become impassable, as by the overflowing of a river or other cause, passengers may justify going on the adjoining fields: but the case is different of a *private way* over the land of another; for *there*, if the way becomes impassable, the person who is intitled to the way cannot justify going on the adjoining lands: for the grant of a way is only in a particular line, not to the right or left, and the grantor is not obliged to repair.

Abbot v. French.  
2 Show. 28.  
Lev. 234. S. C.  
Taylor v.  
Whitehead.  
Douglas 716.

6. Trespass will not lie against the owner of an *estray* for taking him off the lands of the lord of the manor who had seized him, without paying for his keeping; for the owner had the property, and the lord may have *custody* for the keeping, though he might have detained him till paid.

Lady Hatton v.  
Colles.  
Cambr. Sum.  
Aff. 1667.  
Tr. per Pais 197.

“ This case decides that the owner of an *estray* may take him off the lands of the lord of the manor without tender of satisfaction; but it has been clearly adjudged, That he may, where he tenders satisfaction, &c. and the following points been adjudged:”

1st, That without telling any marks or making any proof of the property (which may be done at the trial) that the owner may seize his horse, &c. which was the *estray*, wherever he finds him. 2dly, That in pleading, it is sufficient for him to say that he tendered amends, *without expressing any sum certain*, as he must do in pleading tender of amends for a trespass; and the reason of the diversity is, that in the latter case he is a wrong-doer; but the owner of the *estray* is not a wrong-doer, and it is impossible he should know how long the *estray* had been in the lord's custody, or what would be a proper satisfaction, and therefore pleading generally shall be allowed.

Henley v.  
Walsh.  
2 Salk. 686.

7. Trespass will not lie against the master or seamen of a king's ship or privateer for taking a vessel as *prize* on the seas, which capture is afterwards found to be illegal, and the ship been adjudged not to be a lawful prize in the court of admiralty: for questions of prize or not prize belong exclusively to the court of admiralty; and where it has jurisdiction of the principal question, it shall also have it of the incidental ones; and beside, the court of admiralty gives damages, &c. for the detention: therefore they shall not also be recovered in the courts of common law.

Rous v. Haffard,  
at the Cockpit,  
22 March,  
1749. quot.  
Douglas 580.

Therefore where one who had letters of marque in the *Dutch war*, took an *Offender* for a *Dutch ship*, and brought her into harbour, and libelled her as a prize, and there was a sentence that she was not a prize, and the *Offender* libelled in the admiralty for the damages sustained by hurt the ship

Turner and  
Cary v. Nels.  
1 Lev. 243.  
Sid. 367. & C.

received in port, and a prohibition was prayed on the ground that the injuries libelled for were done on land, and so that an action lay at common law; but a prohibition was refused, as the original capture was at sea, and the bringing her into port, in order to have her condemned, but a consequence of it; and not only the original, but the consequences should be tried in the court of *Admiralty*.

Lindo v.  
Rodney. M. 22  
G. 3. quot.  
Dougl. 501.

This question received a farther decision in a modern case, which was an application for a prohibition from the court of *Admiralty*, to stay them from proceeding to condemn goods which had been captured at the island of *Eustatia* by Admiral Rodney, the property of *British* subjects, on the ground that they had been taken on land. The court refused the prohibition, holding that an exclusive jurisdiction vested in the court of *Admiralty*; and that the courts of common law had no cognizance whatever.

Doullon v.  
Matthews.  
4 Term Rep.  
503.

8. Trespass *quare clausum fregit* is a local action; and therefore it was resolved, That trespass for breaking and entering the plaintiff's house in *Canada*, would not lie in this country.

4th. I shall now inquire,

#### 4. BY WHOM THIS ACTION MAY BE MAINTAINED.

Co. Litt. 4. b.

1. "To maintain an action of trespass, an interest in the soil is not necessary; an interest in the profits is sufficient, as he who was *vestura terræ*, or *herbagium*, may have trespass *quare clausum fregit*, for trampling down the grass, &c."

Walsh v. Hall.  
per Powell at  
Wells, 1700.  
Salk. MSS.  
Buller N.P. 85.

So if *J. S.* agrees with the owner of the soil to plough and sow it, and give him half the profits, *J. S.* may have this action *quare clausum fregit*, for treading down the corn, and the owner is not jointly concerned in the growing corn, but is to have half after it is reaped, by way of rent; which may be of other things than money; though in *Co. Litt.* 142, it is said, it cannot be of the profits themselves; but that (it seems) must be understood of the natural profits.

Wilson v.  
Mackreth.  
3 Burr. 1825.

So where the action was trespass for entering the plaintiff's close, called *Carr Moss*, and digging and carrying away his peat and turf, it appeared that the *locus in quo* was the waste of the lord of the manor, and that the plaintiff and all those whose estate he had, had an exclusive right of digging turves

on this place, but that the other commoners had common of pasture thereon; it was adjudged, That though there was no ownership of the soil, yet that the plaintiff having this *separate and exclusive right* to dig turf and peat there, that for an invasion of this right trespasss would lie.

So where a meadow and common lands are annually divided among the parishioners by lot, after the portion is so marked out, they may respectively maintain trespasss, but not before. *Welden v. Bridgewater. Cro. Eliz. 421.*

2. "Possession is a sufficient title to the plaintiff in trespass *vi & armis*, and where a person is in possession, that is the proper action for any injury done to the land or the profits of it."

For where one Mrs. *Moore*, who had no right in the soil, but was entitled under a lease from the crown, to the sole right of digging lead in such a district, and she let and set to the plaintiff all her right of digging lead-ore therein during her term, and he was in possession, and brought *trespass on the case* against the defendant for taking the lead, it was held that the plaintiff, being in possession, should have brought trespass *vi & armis*; and he was nonsuited. *Harker v. Birbeck. 3 Burr. 1556.*

3. "A special property is a sufficient title for the plaintiff in this action."

As where a *sheriff* had taken goods under a *fieri facias*, and they were forcibly taken away by the defendant, it was adjudged that the sheriff might maintain trespasss, though he had only a special property in the goods. *Tytrell v. Tatham. Cro. Eliz. 639.*

4. "The goods of the church belong to the *churchwardens*, and they may maintain trespasss for taking them." *Hadman v. Ringwood. Cro. Eliz. 145, 179.*

But the suit must be commenced while they are in office, for after their year expired they cannot commence a suit, though they may proceed in it after the year, if commenced before. *Dent v. Prudence, and al. 2 Stra. 852.*

At common law the churchwardens are elected by the minister and inhabitants at large, but by special custom, both may be elected by the inhabitants; however, if the churchwardens bring an action for the goods of the church, and set up an election by the inhabitants at large, they must prove the special custom, or they shall be nonsuited. *Dubois v. — G. Hall. Sitt. Tr. 1775. MSS.*

Cookson v.  
Castline.  
Cro. Eliz. 96.

5. *Baron & feme* may join in action for a trespass done on the wife's land, as for breaking the close, &c. but if it is for taking and carrying away hay, &c. the declaration should lay *that it grew on her land*, or it will be bad.

Arundel v.  
Short, &c.  
Cro. Eliz. 133.

For the rule is, that for taking things merely personal, husband and wife cannot join in trespass: but for the taking of things in action or injuries to the land of the wife, they should join: for the latter things survive to the wife, but not the former.

Litt. § 315.

6. *Tenants in common* should join in an action of trespass for offences which concern their tenements in common, as for breaking their houses or closes, feeding, wasting, or destroying their grass, cutting their woods, fishing in their piscary, or such like. In which case they should have their action jointly, and recover their damages jointly, because the action is in the personalty, and not in the realty.

Co. Litt. 198. a. And in such case the action shall go to the survivor, if one of them dies.

Id.

And the law is the same of coparceners.

Ibid.

And if two tenants in common be of goods, as an house or other personal thing, if one die, his executor shall be tenant in common with the other.

Sutton v.  
Moody.  
Salk. 556.

7. Trespass lies by the owner of the soil against a person for breaking his close and hunting there, *and killing his conies*, or other animals *feræ naturæ*; for the owner of the soil has the property of such animals *feræ naturæ*, as are found on his land, and killed, and may have trespass for them. As if a hare is started and killed on my land, it is my property; but it is otherwise if hunted into the ground of a third person, for then it is the hunter's.

2 Roll. Ab. 553.

8. Before an entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law; therefore an heir before entry cannot have trespass against the abator; but a disseisee may have it against a disseisor for the disseisin itself, because he was in possession, but not for an injury after the disseisin.

## 5. OF THE PLEADINGS IN THIS ACTION.

And 1st, Those on the part of the

PLAINTIFF



## PLAINTIFF.

## 1st. Of the Declaration.

1. If the plaintiff sues out a general writ of trespass, *quare clausum fregit*, he may declare either *generally*, or *name the place where the trespass was done*. If he *names the place in his writ*, and declares on it, the defendant cannot vary the place; but if the *writ is general*, and the plaintiff declares generally, or names the place in his declaration, yet may the defendant vary the place, and so put the plaintiff to his new assignment.

Martin v. Kebleton.  
2 Black. Rep. 1089. in C. B.

For as if the plaintiff declares on a trespass in such a vill, the defendant may reply *liberum tenementum*; and if he proves any part of the vill to be his freehold, he must have judgment, the plaintiff is therefore driven to his new assignment; but Judge *Buller*, in this case, is of opinion, that pleading generally *liberum tenementum*, would be bad, and that the defendant should give a certain name to his freehold; for if the plaintiff should also have a freehold in the same vill, he may prove the trespass there, and have judgment.

Lambert v. Stother.  
Mich. 14 G. 2.  
Buller N. P. 92.

But if the plaintiff gives the close a name, he must prove a freehold in the close so named.

Helwies v. Lomb.  
Salk. 453.

2. "Where the trespass arises from the abuse of an authority given by law, or a *tort* done subsequent to a lawful act, it is sufficient in the declaration to state a trespass generally, and in the replication the particular injury or abuse."

As where the plaintiff declared generally for breaking the house, and carrying away his goods, the defendant justified the taking as a distress damage feasant: the plaintiff replied, that after the distress the plaintiff had converted them to his own use. The defendant demurred for cause that this was a departure; but the court held it to be none; for the abuse of the distress made him a trespasser *ab initio*, and it would be of no avail to the plaintiff to state the conversion in his declaration, for it was no way necessary to his action, and if alleged need not be answered: it would be out of time to state it in the declaration, but it must come out in the replication.

Gargrave v. Smith.  
Salk. 221.

Bull. N. P. 81.

3. In trespass *de bonis asportatis*, the particular goods, &c. taken, must be stated in the declaration.

For

Bertie v.  
Pickering.  
4 Burr. 2455.

For where the declaration was in trespass for taking his goods generally, without saying what goods, after a verdict for the plaintiff, judgment was arrested.

Playter's case.  
3 Co. 38.

So where it was for taking *pifces suos* generally.

Wyat v.  
Effington.  
2 Stra. 167.

So where it was for breaking and entering the plaintiff's house, and taking *diversa bona et catalla ipsius querentis*, the judgment was arrested; and the reason of the cases, is this: That where the declaration is so general, the defendant cannot justify, for he cannot justify as to *divers* goods. 2dly, That unless the goods are specified, a recovery in this action could not be pleaded in bar to another action brought for taking the same goods.

2 Ld. Raym.  
1410. S. C.

" But this is the case only where the action is founded on  
" the taking, or injury to the goods themselves; but it is  
" otherwise where *the taking or injury is laid only by way of*  
" *aggravation.*"

Chamberlain v.  
Greenfield.  
3 Will. 292.

For where the trespass was for breaking and entering the plaintiff's house, and throwing about and spoiling *his goods*, it was objected on demurrer, that the several goods in the declaration mentioned generally, ought to have been set out: but it was over-ruled; for the spoiling of the goods was only laid in aggravation of the trespass, and was not itself the cause of action, which was the entering the house, and so need not be set out in the declaration.

" So if the things sufficiently appear *by any reference to*  
" *others set out in the declaration*, they need not be spec-  
" *fied.*"

Layton v.  
Grindall.  
Salk. 643.

As where the trespass assigned was entering the plaintiff's house, and taking several keys *pro apertione ostiorum* ~~dam~~ *prædict.* it was adjudged on motion in arrest of judgment, That the number of the keys need not be mentioned, as being made sufficiently certain by reference to the house.

4. " In trespass *de bonis asportatis*, the plaintiff should  
" always set out *a property in, or at least possession of, his*  
" *goods.*"

Burser v.  
Martyn.  
Cro. Jac. 46.  
Jocce v. Mills.  
Salk. 640. S. P.

In trespass, the plaintiff declared against the defendant *quod equum cepit a persona of the plaintiff.* After a verdict, judgment was arrested; for he had not laid *equum suum*, or that it was taken out of his possession; for otherwise it would appear that the plaintiff had any cause of action if he had neither property nor possession.

And this was ruled so in a still stronger case, where the trespass was for *taking hay off the plaintiff's land*, and judgment was arrested for not saying *his hay*, though the presumption was so strong from the place from whence it was taken. Terry v. Stradwick. 2 Lev. 156.

5. "So the declaration should also state the *value* of the "goods."

For where the plaintiff declared "for breaking and entering his close, and carrying away his soil to the value of 40s. and continuing the said trespass by digging and carrying away from the 1st of *May* to the 1st of *June*, to his damage, as the declaration was adjudged to be ill, for not setting out the value of the soil carried away during the *continuando*; but this would be cured by a verdict. Strode v. Hunt. 2 Lev. 430. 4 Burr. 2455.

6. The plaintiff may have one writ for several trespasses; as entering his house, cutting his trees, beating his servants, and carrying away his goods; and these may be joined in one declaration. For to aggravate the damages, the plaintiff may join in his declaration that for which he could not have an action; and the party injured may have his action also. F. N. B. 196. Salk. 119.

As where the plaintiff declared in trespass for breaking and entering his house, and beating his wife; it was moved in arrest of judgment, That the wife should have joined, for so she might still have her action for the assault, and the defendant be doubly charged: but the court held it well; for such offences may be joined to aggravate the trespass, and the party injured have an action still. As in the case of a servant, who may have an action for his own injury; and the master for the loss of his service. Dix v. Brookes. 1 Stra. 61.

But the plaintiff in trespass *vi & armis*, cannot recover damages for the loss of the company of his wife, or service of his servant; nor should evidence be admitted to that head. Newman v. Smith. Salk. 642.

7. In trespass, *the day laid in the declaration is not material*, for the plaintiff may prove the defendant guilty at any time previous to the action brought, and it shall be good; for the defendant being once a trespasser, shall always be one. Co. Litt. 283. a. Sir Jonathan Peter v. Knoll. Cro. Eliz. 32.

8. In trespasses of a permanent nature, in which the injury is continually renewed (as by entering the plaintiff's close, and hunting or spoiling his grass) the declaration should state the trespass with a *continuando*: but where the injuries and acts terminate in themselves, and being once done, cannot be done again, there can be no *continuando*; as killing a number of hares, each of which is a separate act. But these are Monckton v. Pashley. Salk. 638. Fontleroy v. Aylmer. 1 L. Raym. 239.

to be declared on, as done *diversis diebus et vicibus*, between such and such a time.

Sacheverel v.  
Sacheverel.  
Cro. Eliz. 182.

So where there has been an ouster of possession and re-entry, the ouster and all acts done during it, may be laid with a *continuando*. And where after an entry the plaintiff has been again expelled, and again recovered possession, he may have trespasses *for the whole time*, with a *continuando*.

Per Holt,  
Salk 639. &c.  
Brook v Bishop.  
Salk. 639.

But if trespass is laid with a *continuando* which cannot be continued, exception should be taken at the trial, for the plaintiff should recover but for one trespass; and if things be laid *continuando* which cannot be so, it is nought after a verdict: but if the trespass be of several particulars, and be laid with a *continuando*, and some cannot be laid with a *continuando*, and other of them may, the *continuando* (after a verdict) shall be held to apply only to trespasses which may be laid with a *continuando*, and the damages given only for those.

Wildgeese v.  
Kellaway.  
2 Salk. 636.  
F. N. B. 196.

9. In this action the trespass must always be laid *vi et armis*, or the declaration will be bad in substance, and so held on a general demurrer. 1st, Because it alters the judgment from a *capiat* to a *misericordia*: Secondly, Because it belongs to the jurisdiction of the county-court if the trespass has been without *vi et armis*.

10. So it is matter of substance in declaring in trespass *vi et armis*, to say *contra pacem domini regis*. Cro. Jac. 443.

Incedon v.  
Burgess.  
Salk. 636.

For where the declaration was for breaking the plaintiff's close, and depasturing it, 36 Car. 2. *continuando* the depasturing till 4 Jac. 2. "*Contra pacem domini nunc regis*;" it was held nought, for there was no *contra pacem*, as to the time of king Charles the Second.

Day v. Musket.  
Salk. 640.

So if the trespass be laid in the late king's reign, *contra pacem* of the present, it is bad; but such faults are cured by verdict.

## 2. Of the Replication.

1. "The declaration in this action being for the most part general, the replication should bring the issue to a certain point, by traversing one thing in particular."

Cockerel v.  
Armstrong.  
Pasch. 11. G. 2.  
C. B.  
Bull. N. P. 93.

As where in trespass for taking a gelding, the defendant pleaded that the place where, &c. was one hundred acres and J. S. seised thereof in fee, and that he as his servant and by his express order took the gelding damage feasant, the replication of *de injuria sua propria* would be bad, that would traverse three or four things, viz. that the place

was his freehold, defendant his servant, the damage feasant, &c.

"But the issue need not consist of a single fact; but it should be on a single point, though it may consist of several facts."

Defendant to this action pleaded to one count "a right of common for his own commonable cattle levant and couchant;" and to the second "a licence to cut down a tree to make a gate." The plaintiff replied to the first, That they were not his own commonable cattle, levant and couchant; and as to the second, that the tree was not so applied, traversed the licence, and concluded to the country. The defendant demurred specially to the first replication, for cause, that it was multifarious, comprising three distinct facts; and to the second for cause, that it concluded to the country, when it should have concluded with an averment; but as to the first the court was of opinion, that the traverse was good, for the several facts make but one point, viz. a right of common, which custom necessarily consists of those parts, viz. a levancy and couchancy for his commonable cattle. And as to the second, the court held, that by the denial of the licence, and admitting all the rest, the plaintiff put the substantial matter in evidence, and so concluded rightly to the country.

Raley v. Rap-  
binton.  
1 Bur.

3. Where the plaintiff declares in trespass on his possession, and the defendant makes title and gives colour to the plaintiff, the plaintiff's replication, which traverses the defendant's title without setting up any title in himself, but merely concluding with *de inj. sua propria*, &c. is good; for trespass is a possessory action, which possession is here admitted in giving colour; and the replication lays the defendant's title out of the case, and then it stands on the plaintiff's possession, which is sufficient against a wrong-doer.

Cary v. Holt.  
2 Stra. 1233.  
Bull. N. P.

As where in trespass *quare claus. fregit*, the defendant justified, that one *J. Wright* was seized in fee, and demised to him, and that the plaintiff claiming by deed of feoffment had entered and been possessed. The plaintiff replied, *protestando*, that *Wright* was not seized in fee, *quod non demisit modo & forma*. And though under this replication the plaintiff made no title in himself, yet he recovered; for being in possession it was sufficient to disprove the title set out by defendant.

Fenner v.  
Fisher.  
Cro. Eliz. 232.

4. If the plaintiff lays a day in his declaration, and defendant justifies as to that day, the plaintiff may in his replication

Webley v.  
Palmer.  
Salk. 222.

plication state another day, and it is no departure, the day being immaterial. (*Ante*, 407.)

Primer v.  
Philips.  
Salk. 222.

For to make a departure there must be a varying in the replication from something materially alledged in the declaration.

Lambert v.  
Stother.  
Mich. 14 G. 2.  
C. B.  
Bul. N. P. 93.

5. In general, if the defendant pleads that the place is his freehold, the plaintiff may reply three manner of ways: 1st, That the place is *his* freehold, and then he must always traverse the defendant's plea, unless he makes a new assignment: for such is not inconsistent with the defendant's plea, and so a traverse is not necessary. 2. He may derive a title under the defendant himself, and then he must not deny its being the defendant's freehold. 3. He may set up a title not inconsistent with that of the defendant; in which case he may traverse the defendant's title or not, as he pleases.

Foreman v.  
Doleman.  
Gillb. Rep. 135.

However, the plaintiff is only put to his new assignment of another place, where the trespass complained of is necessarily local, and plaintiff can recover satisfaction in that place only.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Anon.  
Salk. 643.

1. "A distinction is to be observed in pleading, where the trespass is *transitory*; such as for taking goods, &c. and *where local*; as *quare clausum fregit*: for in the first case the defendant may plead generally, that *he was possessed of the place where, and took the goods damage feasant, ex. gr.* and the plaintiff is foreclosed to pretend a right to the place; nor can it be contested in evidence, for possession is justification enough: but in trespass *quare clausum fregit* it is otherwise, for there the plaintiff claims the close in question, and the right may be contested."

Anon.  
Salk. 643.

Therefore in this case, which was trespass *for taking the plaintiff's cattle*, the defendant pleaded that he was possessed of the close, and that the *plaintiff's cattle having trespassed therein, he took them*; and the plea on the possession only was held good. So where the trespass was taking and carrying away his goods in *D.* defendant pleaded that the *locus in quo* was his freehold, and that he took them damage feasant; on demurrer the plaintiff had judgment; for the trespass being transitory, no *locus in quo* is supposed, and *D.* is only alledged for a venue; therefore if the defendant will make the place material, it must come on his part to shew a place certain.

Helwis v.  
Lomb.  
Salk. 458.

2. The general issue in this action is *not guilty*, and where <sup>2 Hawk P. C.</sup> a person has been *indicted* for a trespass, and has confessed, <sup>333.</sup> and the entry of *cognovit indictamentum* made on the record, he is ever after estopped to plead *not guilty* to an action brought for the same trespass.

### 3. Of the Plea of a Justification.

"As to this, if the defendant has a special justification <sup>Co. Litt. 232.</sup> *he must plead it*; for he cannot give it in evidence on the general issue; for *not guilty* denies the taking, but a justification must admit it; and so the evidence would be inconsistent with the plea."

As where in trespass the defendant pleaded not guilty, <sup>Dryer v. Mills.</sup> and would have given in evidence *the taking of the things for a dreadand*, the court refused to admit it; for he might have justified to that effect, and given the plaintiff an opportunity of answering it, <sup>1 Stra. 61.</sup>

So neither can he give in evidence on the general issue <sup>L. Raym. 732.</sup> that he had in the place a right to common or to a way, or other easement; or that the beasts came through the plaintiff's hedge, which he ought to repair; or that he entered <sup>Co. Litt. 283.</sup> to take his emblements; or that the place was an highway; or in aid of an officer in execution of process, or such like <sup>Watson v. Sparks.</sup> special justifications, <sup>Salk. 287.</sup>

But he may on *not guilty* pleaded to trespass *vi et armis*, <sup>2 Roll. Ab. 676, 7.</sup> give in evidence a lease for years, not a lease at will (for that is as a licence countermandable at pleasure) or that his servant put the cattle in without his assent, <sup>Bro. Gen. Iss. 82.</sup>

So on the general issue, the defendant may give in evidence, that he is tenant in common with the plaintiff (for one tenant in common cannot have trespass against the other, <sup>Haywood v. Davis.</sup> *Litt. § 323.*); but the defendant should plead it in abatement, that the plaintiff was tenant in common with another person; so joint-tenancy should be pleaded in abatement, and cannot be given in evidence on the general issue. <sup>Salk. 4.</sup>

2. In pleading a justification there is a difference in the case of an officer acting under process of court, and of a private person. <sup>Jones v. Randal. Hill. 1652. Tr. per Pais 207.</sup>

1. In trespass against the sheriff, it is a sufficient justification that he shews his writ without shewing a judgment: so it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ *was returned*, if returnable; but the bailiff need not, because it is not in his power. <sup>Britton v. Cole. Salk. 408. Cotes v. Mitchell. 3 Lev. 40.</sup>

*Wid.*

But in trespasss against the *plaintiff in a former action, or a mere stranger*, they cannot justify, unless they shew a judgment as well as an execution; for the judgment might be reversed, and it ought to be at their peril if they take out execution afterwards.

*Freeman v. Blewitt.*  
*Salk. 489.*

And the case is the same of all *principal officers of inferior courts*, as has been laid down as to sheriffs, viz. that they must shew returnable process returned. This was the case of a serjeant at mace of the sheriff's court of London. Principal officers seem to mean those only who have return of writs.

2. But as to justification under process of inferior courts, it must be observed,

*Higginson v. Martyn & Hadley.*  
*Mich. 28 Car. 2*  
*Buller N. P. 83.*

That though an officer may justify under the *mesne process* of an inferior court, without saying that the cause of action arose within its jurisdiction, yet if he justifies under *process of execution*, he ought to shew that the *cause of action arose within the jurisdiction* of the court, or at least was so laid: but that would not be a sufficient justification to the plaintiff in the action, who ought to know the extent of the jurisdiction he applies to for redress.

*Pinsger v. Gale.*  
*2 Vent. 100.*

3. So if the defendant justifies the taking under a *plaint levied in an inferior court*, and precept to the sheriff to take, the plea should, 1st, If the court was not of record, *set out the proceedings at large*; it is not sufficient to say *taliter processum*. 2. It should be shewn that the debt arose within the jurisdiction. 3. It should say that the precept was *directed by* the said court, not that it *issued out of it*.

*Matthews v. Carew.*  
*Salk. 107.*  
*Wilton v. Hardingham.*  
*Hob. 29.*  
*Coyvers v. Franks*  
*3 Lev. 19.*

4. But if the defendant justifies the taking as *bailiff of an inferior court* (as the leet) for an amercement, for an offence within the leet, it is sufficient for him to say that the offence *was presented*, for *non refert* as to him, whether in fact the offence was committed or not. But, 2dly, He should state an *effreat by the court, or warrant from the steward*, for that is his authority. And in the case of a *private person*, the plea in all cases should further state, First, An amercement *by the jury*; it is not sufficient to state an amercement generally. 2. That the *amercement was offered* to so much. 3. That the plaintiff was *resiant within the leet*.

*Salk. 409.*

3. If one comes in aid of an officer, at his request, he may justify as the officer may do; but such request or command is traversable: as in trespasss, if the defendant justifies damage feasant, or by distress for rent, he must make himself bailiff to the person having right, or that he did it by his command; but the command is traversable.

*Salk. 107.*

4. " And



4. "And in general, wherever a person justifies a taking under any authority whatever, he must shew every matter and part of that authority under which he justifies."

And where the defendant justified the taking of a cloth out of a pack, as deputy of grantee of the place of alnage, and that the piece of cloth had not the alnage seal on it; the plea was on demurrer adjudged to be bad: 1st, Because he did not shew the patent appointing the alnager: 2dly, That it was an office which could be executed by deputy: 3dly, That there being two statutes, 27 H. 8. 12. & 6 Ed. 6. c. 4. which give a penalty for exposing cloth to sale without the alnage seal, he did not shew on which he sued: 4thly, He did not say where the deed appointing him deputy was sealed and delivered. Watkins v. Johns.  
Cro. Eliz. 187.

And these cases following have been decided as to what justifications are good, and what otherwise.

1. In trespass for cutting the plaintiff's nets and oars, the defendant justified that the plaintiff and others came into his fishery, and would have taken his fish, wherefore to prevent it, he destroyed their nets, &c. The plea was adjudged ill on demurrer, for *he should have taken them damage feasant*, and not cut and destroyed them. Reynell v. Champernon.  
Cro. Car. 165.

2. If tenant for life dies, his executor shall have convenient time to remove his cattle and effects off the lands: and therefore where trespass was brought, and the executor pleaded that the cattle remained on the land for six days, *being the time required before he could get a place for the cattle*, it was held to be good. Stodden v. Harvey.  
Cro. Jac. 204.

3. The defendant, in trespass for entering the plaintiff's house, and taking a corselet and pike, pleaded, that he had purchased them from a person to whom they belonged; had entered the plaintiff's house, *by permission of his wife*, and took them; it was adjudged ill, for the wife could give no permission. Tayler v. Fisher.  
Cro. Eliz. 245.

4. So in trespass for taking goods, it is a good plea that *they were the property of the defendant himself*, and that finding them in plaintiff's possession, he took them again; *for a man may take his own goods where he finds them*, when out of his possession by wrong, and not by his own delivery. Chapman v. Thumblethorp.  
Cro. Eliz. 329.

5. To an action of trespass for breaking and entering the plaintiff's land, the defendant justified under a right to go on the plaintiff's land to *glean and gather the ears of corn, after the crop was drawn off*; upon general demurrer, it was resolved, That by law there was no such right, and that therefore the justification was bad. Steele v. Houghton.  
H. Blackl.  
Rep. 51.

6. Under

Dubberley v.  
Page.  
2 Term. Rep.  
391.

6. Under the statute of *Merton* the lord has a right to appropriate part of the common, provided he leaves sufficient for the use of the commoners: But where the tenants have a right to estovers, or to dig gravel, on the waste or common, it shall controul the right the lord has under the statute.

7. Other justifications are mentioned before; as it is good that the defendant came on the plaintiff's ground in pursuit of ravenous beasts, &c. &c.

3. "In all cases of pleading where a trespass is local or specially assigned by the plaintiff, and the defendant justifies at a different place, or in a different manner, the plea should conclude with a traverse."

Benjamin v.  
Holwell.  
1 Wils. 81.  
Thompson v.  
Clark.  
Cro. Eliz.  
504. S. P.

As in trespass for taking the plaintiff's cattle at *Hereford*, the defendant justified the taking as bailiff of the manor of *A.* as a *distingas* to compel the plaintiff's appearance at the manor court, and concluded *quæ est eadem transgressus*, without saying *absq. hoc* that the defendant was guilty at *Hereford*, and so traversing the place laid in the declaration; and on special demurrer the plea was held ill for want of the traverse; for it was no answer to the trespass laid at *Hereford*, that not being excluded by the traverse.

"But where the defendant has been a trespasser at the place laid in the declaration, though not as to the whole, or it is a continuation of the same trespass, he need not conclude his plea with a traverse."

Riley v.  
Packhurst.  
1 Wils. 219.

As where in trespass for taking the plaintiff's cattle at *Teddington*, the defendant justified the taking them at *Kingston* damage feasant, and that he carried them to *Teddington*, where he impounded them; on demurrer it was objected, that the justification was local, and therefore that defendant should have traversed the place in the declaration, *sed non allocatur*; for when the defendant says that he impounded them at *Teddington*, if he had no right to take them, he was a trespasser there, and so agreeing in the place, he should not have traversed.

"And it is the same where a trespass is justified in a manner different from what it is assigned; the plea should conclude with a traverse."

Mill v. Pri-  
deaux.  
Cro. Eliz. 384.

For where the trespass assigned was, that the defendant had chased the plaintiff's cattle, *ita quod per fugationem intrierunt*; the defendant pleaded that the *locus in quo* was held of him by certain services, and that he distrained the beasts for the services, and put them into pound overt, where they

they perished *by hunger* by default of the plaintiff, which is the same trespass: the plea was adjudged to be ill; for having assigned a different cause of the beasts death, he should have traversed the cause set out by the plaintiff.

4. *Accord and satisfaction* is a good plea in trespass, but not accord alone, without satisfaction. As where in trespass for taking the plaintiff's cattle, it was held a bad plea that there was an accord "that the plaintiff should have his cattle again," for that was *no satisfaction*. 1 Roll. Ab. 118.

"And the plea should shew *how* the satisfaction was made, that the court may judge if it is good."

For where to trespass *quare clauf. freg.* the defendant pleaded that the trespass had been done by him and one *Jane Rowland*, and that after the trespass it had been accorded between the plaintiff and *Jane Rowland*, that she should abate fourteen shillings, which were due to her by the plaintiff's father; and that she had abated them: on demurrer the plea was held bad, for it did not shew *how she had abated the money*; for it should be such as would be an absolute bar to the demand in future, as the satisfaction should be of value. It was further agreed, that though the satisfaction was not to the plaintiff himself, yet that being made at his request, and by his consent, that it was good. Hillman v. Unclea. Skin. 391.

So in pleading an arbitrement which is a plea similar in its nature to this, the defendant should shew the place where the submission was, and alledge performance of his part. Hare v. George. Cro. Eliz. 66.

5. *A release* is a good plea in trespass.

But if the defendant plead a release before the time of the action brought, he must also go on and plead it with *an absq. hoc that he is guilty at any time after*; for the plaintiff may prove a trespass at any time before action brought: so that the plea should cover the whole time to the bringing of the action. Webley v. Palmer. Salk. 222.

And if a trespass is joint, a release to one is good to all; for though a trespass be committed by several, yet it may be sued against one or against all, for in trespass all are principals, and each is answerable for his fellow's act; and as there can be but one satisfaction, a release to any one is a release of the trespass, and all have equal benefit. Cooke v. Jenner. Hob. 66.

And on this ground, if the plaintiff brings a joint action of trespass, and the parties sever in their pleas, and Parker v. Sir J. Lawrence. ONE Hob. 70.

one is tried and found guilty, and damages assessed, the plaintiff may enter a *noli prosequi* as to the others.

Norton's case.  
Cro. Eliz. 30.

And on the same ground, where a trespass was committed by two, and recovery by verdict of damages against one, this was (by two judges to one, held to be a good plea in bar to an action brought against the other; for plaintiff had elected to bring his action single, and could have but one recompense.

6. By statute 21 Jac. I. c. 16. the defendant to an action of trespass *quare clausum fregit*, may plead a disclaimer, and that the trespass was by negligence and involuntary, and tender sufficient amends before the action brought; and if the issue be found for the defendant, or the plaintiff be nonsuited, he shall be barred.

Bailey v.

Vivash.

1 Stra. 549.

2 Roll. Ab.

570.

Co. Litt. 283. a.

Salk. 686.

But the defendant cannot plead tender of amends *alone*, for the statute only gives such plea in the case of an involuntary trespass and disclaimer.

If the defendant pleads tender of amends for any trespass committed by him, he must further plead *what sum* he tendered for amends: an exception to this is where the owner of an estray makes a tender for the keeping. (*Ante*, 401.)

7. By stat. 24 Geo. 2. c. 44. constables not being liable for any thing done under a justice's warrant, that is a good plea; but by 7 Jac. c. 5. they may plead the general issue, and give the special matter in evidence.

8. The *statute of limitation* is a good plea in this action; it is founded on statute 21 Jac. I. c. 16. s. 3. which enacts, "That all actions of trespass *quare clausum fregit*, shall be brought within *six years* after the cause of action accrued; and if on any such actions judgment be given for the plaintiff and be afterwards reversed for error, or judgment be arrested, the plaintiff may bring a new action within one year."

Clare v. Frost.

9. The defendant in pleading may plead *two matters in justification*: As here, 1st, The cutting down a tree for repairs. 2. That the tree stopped a water-course, wherefore he cut it.

10. By stat. 7 Jac. I. 5. it is enacted "That if any action shall be brought against any justice of peace, constable, &c. for any thing done by virtue or reason of his office, he may plead the general issue, and give the special matter in evidence."

## 6. OF THE EVIDENCE IN THIS ACTION.

## I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "The evidence must always follow the issue; that is, <sup>2 Black. Rep. 1165.</sup> no matter out of it shall be given in evidence which might have been replied, and would have supported the action; for the evidence should only go to disprove the facts in the plea."

As in trespass by the lord against a commoner, for spoiling and destroying his peat and filling up the holes, the defendant justified under a right of common; and because that he was hindered from enjoying his common in so ample a manner, by reason of the heaps of peat, that he removed them and filled up the holes: the plaintiff replied *de injuria sua propria* generally: and on issue joined, would have given in evidence, *that there was a sufficiency of common left*: but it was held that he could not, it not being within the issue, which was confined to the facts stated in the plea. <sup>Dayrolles v. Howard. 3 Burr. 1385.</sup>

2. But if the principal trespass will bear an action, the plaintiff may under the general clause of *alia enormia fecit*, give in evidence to encrease the damages, *any thing that will not itself bear an action*, as *ex. gr.* an injury *ex turpi causa*: but *what would itself bear an action must be stated in the declaration*. As in trespass *quare claus. fregit*, the plaintiff would not be allowed to give in evidence that the defendant then took away his horse, for that would bear an action itself; but he might that he entered his house and debauched his daughter, for that will not bear an action, but is an injury *ex turpi causa*. But this seems to be the case only where the defendant pleads *not guilty*, for there the issue is on the facts stated in the declaration. <sup>Sipporah v. Bassett. Sid. 225.</sup>

3. If in trespass *quare claus. fregit*, the plaintiff sets out the abutments of his close, he must in evidence prove every part of his abutments; as if it be a *parte australi* of the mill of *A.* he must prove the mill there, and that it was in the tenure of *A.*; but it will be sufficient though there is an highway between them. So if the abuttal is laid to the east, if proved to the north-east it is sufficient. <sup>2 Roll. Ab. 677.</sup>

So if the trespass is laid in an acre, laid with proper abutments, proof of a trespass in half an acre will be good, for the abutments extend only to the whole acre. <sup>Winchworth v. Mann. Yelv 114.</sup>

4. When the trespass is laid with a *continuanda*, the plaintiff ought in evidence to confine himself to the time in the declaration: <sup>Per Holt, at Hertford 4 Ann. Buller N. P. 86.</sup>

declaration: But he may waive the *continuande*, and prove a trespass on any day before the action brought, or he may give in evidence only part of the time laid in the *continuanda*.

*Trials per Pais.* 232. In trespass with a *continuando* to the land, the plaintiff should prove a re-entry, for otherwise he shall only have damages for the first entry.

*Buller N. P.* 84. 5. In trespass *de bonis asportatis*, as the plaintiff is obliged to set out the particular goods in his declaration, so he can only prove the taking of such goods as are mentioned in the declaration; for as the reason for specifying the goods is to enable the defendant to plead the former action in bar to another for taking the same goods, the plaintiff shall for the same reason be confined in his proof; for if admitted to give evidence of the taking of things not in the declaration, he might recover twice for the same things.

*Fulton v. Crouch.* *Cro. Eliz.* 492. 6. If the plaintiff makes a new assignment, and the general issue be joined on it, he cannot prove the defendant guilty at the place mentioned in the plea in bar, for by the new assignment he waives the place whereto the defendant has pleaded: and if the place assigned by the plaintiff be the very *locus in quo* pleaded by the defendant, yet the defendant should not rejoin that it is so, but plead the general issue, *not guilty*, and at the trial he must have a verdict, because the plaintiff by his new assignment waived that place.

*Year Book.* 27 H. 8. 7. Therefore where the defendant justified in a place called *A.* as his freehold, and the plaintiff by way of new assignment, said the place in which, &c. was called *B.* it was held no plea to say that *A.* and *B.* are the same place; for by the new assignment the bar was at an end.

*Cook q. tam v. Priddle.* *Trenton L. ent.* All 1785 MSS. 5. In an information for obstructing an excise-officer in searching for prohibited goods, under stat. *Geo.* 3. by which a duty is laid on coffee, tea, &c.; the search had been attempted to be made as directed by the statute under a justice's warrant, which warrant recited information having been given to the justice of run goods (*viz.* —) being lodged in such a place: the warrant was produced, but the defendant's counsel objected that the information on which the warrant was granted ought likewise to be given in evidence; but *Just. Builer over-ruled the objection*: it was then objected to the proof of the officer's appointment in pursuance of the statute; for though in general it may be proof sufficient of a person being an excise-officer, that he has acted as such without producing his appointment, yet the statute by which these duties are laid, does not give

give the management of them to the board of excise, but to persons appointed by the Lords of the Treasury; and therefore it ought to be shewn that the Lords of the Treasury had allotted the management of these duties to the commissioners of the excise; but this objection the judge also over-ruled.

#### OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. "If the defendant justifies, if he proves a good title in himself, though not strictly as set out in the plea, it is sufficient."

As where in trespass the defendant justified the taking, by Goodman v. plea, that the house of the plaintiff was held of the Earl of Ayling. Northumberland by homage fealty, suit of court, escuage uncertain, enclosing his park with pales, and rent of a pound of cummin, and he for three years rent and subtraction of suit justified the taking; he proved, and the jury found that he held by homage and fealty, and enclosing his park, and a pound of cummin: and the defendant had judgment; for the finding agreed in substance with the title set out. Yelv. 148.

2. In trespass against officers of the excise and customs, Wood v. Chessal. they may plead the general issue, and give the special matter 2 Black. Rep. 1245. in evidence. & cal. ibid.

3. There is a difference to be observed as to the evidence in actions against the sheriff or his officers for tortious taking of goods in execution where the plaintiff is the defendant in the original action, and where the action is by a stranger, whose goods have been taken.

Where the action is by a stranger, whose goods have been wrongfully taken by the sheriff, under a *fi. fa.* or other execution issued against another person, the sheriff or his officers in justifying under the writ, is obliged to produce or prove a copy of the judgment upon which the *fi. fa.* issued. Martyn v. Podger. 5 Burr 2631.

But if the action is by the person against whom the *fi. fa.* issued (that is, the defendant in the original action) in that case, a copy of the judgment need not be given in evidence. Lake v. Billers. Lord Raym. 733.

4. In trespass for taking goods, the defendant justified under a distress for rent: it was ruled, 1. That the defendant should prove a letting at a certain rent, and that the rent was due at the time of taking the distress: 2. That in case the goods had been removed off the premises, that the notice should specify Moor v. Holme. per Eyre, C. B. Maistone sum. A lizes, 1799. Mss. E. c. 2 the

the place to which they were removed, and also contain an inventory of the goods.

Cafe of Page  
and Crook.  
Style 401.

5. If trespass be brought against one *simul cum* others, if nothing be proved against one, he may be examined as a witness for the rest.

## 7. THE VERDICT, DAMAGES, JUDGMENT, AND COSTS.

### 1st. OF THE VERDICT, DAMAGES, AND JUDGMENT.

Dawkes v.  
Pilfield.  
Cro. Jac. 297.

1. The plaintiff in this action cannot recover *more for damages* than he has laid in his declaration: but for damages and costs together, he may have judgment for more than he laid, for the suit may have been of long continuance.

Hill & al. v.  
Goodchild.  
5 Burr. 2790.

2. In a joint action of trespass, *where the jury find the defendants jointly guilty, they cannot sever the damages* according to the degrees of guilt: and therefore where in the *Common Pleas* the plaintiffs in this action were declared against jointly, and a verdict against one for one shilling, and against the other for forty shillings, and judgment was entered up accordingly; on error brought into the *King's Bench*, the judgment was reversed.

“And the case is the same where there is a judgment by default.”

Onslow v.  
Orchard.  
1 Stra. 422.

For where the case was so, and on a writ of inquiry the damages were found as to one, 20l. and as to the other, one shilling, judgment was arrested.

But this is the case where the defendants *plead jointly*; for if they *sever in their pleas*, different damages may be assessed as to each.

Chapman v.  
Houfe & al.  
2 Stra. 1140.

For where in trespass against three, one let judgment go by default; another pleaded not guilty, and the third demurred to the declaration: before trial of the general issue, there was likewise a writ to assess damages on the judgment by default, and contingent damages on the demurrer: the jury gave a verdict for the defendant on not guilty, and assessed 100l. as to one of the other defendants, and one shilling as to the other: and *Chief Justice Lee* was of opinion that the judgment should be accordingly, they having severed in their pleas.

So the rule first laid down seems to apply only *where the finding is joint*: and that the jury may find them severally guilty as to part, and not guilty as to part, and assess damages severally.

### 3. Where



3. Where there are two defendants sued jointly who sever in their defence, or if one lets judgment go by default, and the other justifies: as in trespass for taking goods against two: if one lets judgment go by default, or one pleads not guilty, and the other justifies the taking as a distress, or by licence from the plaintiff to sell, or that the plaintiff gave him the goods; if the defendant who justifies has a verdict, judgment shall be arrested as to the other, since upon the whole it appears that the plaintiff had no cause of action.

Biggs v.  
Greenfield.  
1 Str. 810.

Tilly v. Moody.  
Cit. Hob. 54.

4. "The jury in finding their verdict may vary from the declaration, and find only part of what is laid."

As if the declaration be for taking a stack of rye, they may find the defendant guilty as to five quarters, and not guilty as to the rest; so if the declaration be for cutting and taking away trees, they may find the defendant guilty of the taking, though not of the cutting.

2 Roll. Ab. 684.  
Cro. Car. 54.

## 2. OF THE COSTS TO THE PLAINTIFF.

This is founded on several statutes, the first of which was the statute of *Gloucester*. The statute of *Gloucester* gives costs in all cases where there are damages. The next statute after this was 43 *Eliz. c. 6.* which enacts, "That in actions personal, not being for title to land, if the judge certifies that the damages are under forty shillings, the plaintiff shall have no more costs than damages."

This statute was for the purpose of taking away costs from the plaintiff where the damages were under forty shillings, by enabling the judge to give a certificate to that purpose, as otherwise, under the statute of *Gloucester*, the plaintiff would have costs, by reason of the damages: and certificates have been granted on it, to take away the plaintiff's costs. *Vid. case in marg.*

Walker v.  
Robinson.  
1 Wilf. 93.  
& case ib.  
2 Str. 1232.  
S. C.

2. The next statute was 22 & 23 *Car. 2. c. 9.* which enacts, "That in trespass and other actions personal, if the jury find under forty shillings damages, the plaintiff shall have no more costs than damages, unless the judge shall certify that the freehold or title to the land came principally in question."

As by the first part of this statute costs were taken away from all cases of trespass under forty shillings, it gave them to the plaintiff in one case; that is, where the freehold or title to the land did come in question, the damages in such case being in general but small, the land itself being the object.

Accordingly these decisions have taken place:

1. Though

**Moor v. Hall.** Trin. 1 G. 3. Bull. N. P. 329. 1. Though the words of the statute are *trespass* in general, yet the statute only extends to *trespass quare clausum fregit*; that is, to cases wherein the freehold could come in question, and not to trespass *de bonis asportatis*, or *trover*, or such actions; that is, in those actions, be the damages however small, the plaintiff shall have his costs, because in these the freehold could not come in question: but in trespass *quare clausum fregit*, in which the freehold *could* come in question, the plaintiff shall not have his full costs, unless the judge shall certify *that the freehold did come in question*.

**Kempster v. Deacon.** 1 Lord Raym. 76. 2 Salk. 665. S. C. 2. Therefore, if it appears from the pleadings themselves that the title to the land did come in question (*as where a view was granted*) there the plaintiff shall have his costs, without any certificate.

**Higgins v. Jennings.** 2 Stra. 726. **Beal v. Moore.** 2 Stra. 1168. S. P. So where to trespass *quare clausum fregit*, the defendant justified for a way, and the plaintiff replied *extra viam*, upon which issue was joined, and two-pence damages; the plaintiff had his full costs without a certificate, for it appeared that the freehold was in question.

3. "So that the cases in which a certificate is necessary are, when by presumption the freehold might come in question, but it is doubtful whether it did so or not; in these cases a certificate is required."

**Clegg v. Molyneaux.** Douglas 750. As where the trespass was for breaking the plaintiff's close, and taking and carrying away divers quantities of peat and turf, damages one shilling; there being no certificate, the court held that the plaintiff should have no more costs than damages, as the freehold might come in question.

**Blunt v. Miller.** 1 Stra. 645. So where the trespass was for breaking and entering the plaintiff's house, and keeping him out of possession for a month.

**Anon.** 2 Vent. 48. So where it was for breaking the plaintiff's close, and putting stakes on the land.

**Hill v. Reeves.** C. B. Paich. 3 Geo. 1. So for breaking the plaintiff's house, and destroying his window-shuts and bolts: so for cutting his trees. In all these cases, the damages being under forty shillings, and no certificate, as the freehold might have come in question, the court held that the plaintiff should have no more costs than damages.

4. "And therefore, if it appears from the pleadings that the freehold could not come in question, the plaintiff shall have his full costs, though the damages are under forty shillings."

As where the trespass was for breaking and entering the plaintiff's *free warren* and killing his game, and damages one shilling, the plaintiff had his full costs; for the freehold could not come in question on the right of franchise of free warren. Lord Dacre v. Tebb. 2 Black. Rep. 1151.

So where the trespass was for entering the plaintiff's close, and chasing his cows and fowls, and damages under forty shillings, the plaintiff had his full costs. *S. P. Thompson v. Berry*, 1 Stra. 551. Keen v. Whistler. Gilb. Rep. 197.

This is the case of all trespasses *de bonis asportatis*. In which case of *asportavit* of personal things, there are always full costs.

5. But there are certain exceptions to be observed; as first, if there are two counts in the declaration, and one is *de bonis asportatis*, but in the other the freehold might come in question, if the jury finds damages entire, though under forty shillings, the plaintiff shall have his full costs; for as part of the damages must be applied to the count *de bonis asportatis* it shall carry costs for the whole: but it had been otherwise had the jury found *not guilty* as to that count, and a verdict on the other under forty shillings. Reeves v. Butler. Gilb. Eq. Rep. 196.

So if there are many counts in a declaration, though for different causes of action, if the plaintiff has a verdict on one count, he shall have his costs of the whole declaration. Norris v. Waldron. 2 Black. Rep. 1199.

2. "Where *special damages* are laid by way of aggravation, if they are of themselves actionable, the plaintiff shall have his full costs, though the damages are under forty shillings: but if the *special damage* laid would not bear an action, the plaintiff shall have no more costs than damages if under forty shillings, if it is trespass which requires a certificate." 1 Stra. 192.

As where the trespass was for putting diseased cattle into the plaintiff's close *per quod* his cattle were infected, and verdict for the plaintiff damages twenty shillings, he had his full costs, because the special damage was itself actionable. Anderson v. Buckton. 1 Stra. 192.

But where the plaintiff declared in trespass for entering his house, and making an affray and continuing there till the plaintiff gave him a note for 6l. verdict for the plaintiff, and one guinea damages, it was adjudged, That the continuing was only aggravation, and no distinct actionable fact; and therefore the damages being under forty shillings, the plaintiff could have no more costs than damages, besides too the freehold might have come in question. Appleton v. Smith. 3 Burr. 1281.

Roop v. Scritch.  
4 Mod. 378.

3. Where a cause was originally commenced in an inferior court, if removed into K. B. or C. B. and the damages found are under forty shillings, the plaintiff shall have his full costs without a certificate.

Sheldon v.  
Ludgate.  
Tr. 2. G. 1. C. B.  
Buller N.P. 329.

4. On writs of enquiry in cases within the statute, the plaintiff shall have his full costs, though his damages are under forty shillings.

6. By stat. 4 & 5 W. & M. c. 23. "Every apprentice, inferior tradesman, or dissolute person, who is convicted of a trespass in fishing, hunting, or fowling in another's ground, shall pay full costs."

Bennet v.  
Talbois.  
1 Lord Raym.  
149

If a person is an inferior tradesman, it matters not what his qualification is in point of estate, for if convicted of such trespass, he shall pay full costs.

Puxton v.  
Mingay.  
2 Will. 70.

But it seems not easy to be decided who is an inferior tradesman, the court being equally divided in the question, though it seemed the better opinion that it should have been left to the jury to decide, Who was or was not an inferior tradesman? The defendant was a surgeon and apothecary.

Pallant v. Roll.  
2 Black. Rep.  
900.

But, 1st, a gentleman's huntsman is not a dissolute person within the statute: 2dly, The court held in this case, that if the plaintiff declares against a defendant as a dissolute person, who proves not to be so, that he shall not for that reason be non-suited; for the statute gives no new cause of action, the trespass sued for is still as before; and this is only a collateral matter affecting the costs; so that if the costs are under forty shillings, the plaintiff shall have no more costs than damages.

7. By stat. 8 & 9 W. 3. c. 11. "In all actions of trespass in which the judge shall certify the trespass to be wilful and malicious, though the damages are under forty shillings, the plaintiff shall have full costs."

3 Black. Com.  
214.

And every trespass is wilful where the defendant having notice to depart, or is warned not to come on the land, yet does so notwithstanding, and malicious where it appears to be done to harass the defendant.

Gely v. Day &  
al. Winton.  
Sum Ass. 1783.  
MSS.

Therefore where the defendants were playing at cricket on the plaintiff's ground, and were warned to go off, notwithstanding which they continued to play, and damages thirty shillings, the Judge (Baron Perryn) was applied to for a certificate, and a case cited of *Swinnerton v. Jarvis, K. B.* in which it had been held, That the judge was obliged to certify: the judge at first was of opinion, that here being no new trespass, but a continuation of the former, that it differed from

from that case; but afterwards, having consulted with Justice Heath, he said the point had been determined, and that the judge had no discretion, even where the trespass was a continuation of that committed before notice; and he certified accordingly.

This case was mentioned by Justice Gould, *Surry Sum. Aff.* 1792, and recognized as law; and he certified in a similar case.

The certificate by the judge under this statute must be made in court after the trial, and cannot be given afterwards. *Ford v. Parr & al.* 2 Will. 41.

It may not be amiss to observe on the object of these two last mentioned statutes, that, as under statute 22 & 23 Car. 2. the damages being under forty shillings, the plaintiff was deprived of his costs, this stat. 8 & 9 W. 3. was for the purpose of giving them to him in the particular case of a wilful and a malicious trespass, and as the not paying of costs was a benefit to the defendant, the statute 4 & 5 W. & M. was to take that away and annex costs as a punishment, in case of trespass by apprentices, &c.

*Id.* Cases of Certificates as to Costs, in case of Excise-Officers, *ante*.

### 3. OF THE COSTS TO THE DEFENDANT.

1. By statute 4 Jac. 1. c. 3. "If any person commences an action of trespass or other actions in which the plaintiff might have his costs, and after the defendant's appearance becomes nonsuited, or verdict passes against him, the defendant shall have costs."

2. By stat. 8 & 9 W. 3. c. 11. "In trespass against several, if any one or more is acquitted, he shall have his costs against the plaintiff, unless the judge shall certify upon the record that there was good cause for making him a defendant."

This statute is confined to trespass *vi et armis* only, and does not extend to trespass on the case; for all statutes giving costs are to be construed strictly, and case is not mentioned. *Dibben v. Cook.* 2 Stra. 1015.

3. By stat. 7 Jac. 1. c. 5. "If trespass *vi et armis* or case be brought against any justice of peace, mayor, bailiff, or constable, for any thing done by virtue of their office, if they have a verdict, or the plaintiff be nonsuited, or suffer any discontinuance, the defendant shall have  
" his

" his double costs allowed by the judge who tried the cause."

This act has been construed to extend to under-sheriffs and deputy constables, though not mentioned.

Anon.  
2 Vent. 45.

But the judge *who tries the cause* must certify that the defendant was acting in execution of his office, and order the *postea* to be marked for double costs; for the court cannot do it after trial.

Grindley v.  
Holloway.  
Doug. 294.

Such is the case where *there has been a trial or nonsuit*, the suggestion that the defendant was an officer; and the allowance of double costs must *then* be made.

Devenish v.  
Martyn.  
Pasch. 1734.  
Buller N. P.  
332.  
2 Stra. 958.  
S. C.

But where the plaintiff *discontinued* by leave of the court, upon an affidavit that the cause was against the defendant for what he had done as a justice of peace, the court gave him a *rule to the Master to tax double costs*, which was made absolute; for where the plaintiff discontinues with leave of the court, it is always on payment of costs; and that in this case is double costs.

4. By statute 21 Jac. 1. c. 12. The provisions of this statute are extended to churchwardens and overseers of the poor.

Tillett v. Broad.  
Surrey Lent  
Ass. 1792, and  
K. B. Trin.  
32 G. 3. MSS.

5. In this case, which was trespass for breaking and entering the plaintiff's close, the defendant justified, under a right of way laid in different manners; as, 1st, By prescription: 2dly, Under a demise of a field, called *Bowers Field*, with *all ways* leading thereto: 3dly, By reason of unity of possession. The cause was referred at the assizes; and the costs of the cause were to abide the event of the award. The arbitrator awarded, That the defendant had a right of way over the *locus in quo*, but not by any of the manners laid in the plea, but as a way of necessity. Upon the question coming before the court, they were of opinion, That the costs were to abide the legal event of the suit; that therefore, the defendant not having given evidence in support of his pleas as he had pleaded them, that though under the award he had a right of way, yet that the plaintiff should have his costs.

A  
D I G E S T  
OF  
The Law of Actions and Trials  
AT

**Rifi Prius.**

*THE SECOND EDITION, CORRECTED,*  
WITH CONSIDERABLE ADDITIONS FROM PRINTED AND  
MANUSCRIPT CASES,  
And Three New Chapters  
ON THE LAW OF CORPORATIONS AND EVIDENCE,

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BY  
*ISAAC 'ESPINASSE,*  
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

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*Et Spes et ratio Studiorum.* JUV.

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V O L. II.

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*D U B L I N:*

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# D I G E S T

OF

## The Law of Actions and Trials.

### CHAPTER IX.

#### The Action of Ejectment.

**EJECTMENT** is an action whereby a term of years is recovered; and is either on the title, or for non-payment of rent.

1. When in this action the right to lands and tenements is tried, it is called *ejectment on the title*, and is done in this manner:

He who claims the land against him who is in possession, is supposed to make a lease for years to some fictitious person, who is then supposed to be in possession until he is ejected either by the tenant in possession or by some fictitious person, who is called the casual ejector; against him the fictitious lessee brings his action for the expulsion, and he (the casual ejector) gives notice to the tenant in possession to defend his title to the lands, which thereby comes in issue; and if found for the plaintiff, he is put into possession.

2. *Ejectment for non-payment of rent* was given by statute 4 G. 2. c. 28. of which hereafter.

In treating of the action of Ejectment, I shall consider it, 1st, With reference to the *things* for which it lies: 2dly, With reference to the person: 3d, Of serving the ejectment: 4th, The pleadings: 5th, The evidence: 6th, The verdict, and other subsequent proceedings.

#### 1st. OF EJECTMENT, WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

1. "An ejectment will properly lie for nothing of which Buller, N P. 99. "the sheriff cannot deliver possession under an execution."

Therefore incorporeal hereditaments, things lying merely in grant *quæ nec tangi nec videre possunt*, are not properly objects of this action.

But to this rule there are exceptions.

Newman v.  
Holdmyfast.  
1 Stra. 54.

1. For an ejectment will lie for *common appendant or appurtenant*, but not for *common pur cause de vicinage*; for the sheriff by giving possession of the land gives possession of the common: but *common pur cause de vicinage* is a mere permission.

Priest v. Wood.  
Cro. Car. 301.

2. It is enacted by statute 32 H. c. 8. *sect.* 7. "That where any person shall have an estate of inheritance in *tithes* or other *spiritual profits*, which shall be in lay-hands, that he may maintain an ejectment or other action for them."

Camelst v.  
Clavering.  
2 Lord Raym.  
689.

This statute confined the cases of ejectment for tithes to *lay-hands*, but it has since been extended to allow ejectments for tithes where they are in the hands of the clergy.

Goodtitle ex  
dim. Chester v.  
Alker & Elms.  
1 Burr. 123.

2. Ejectment will lie for land which is part of the *king's highway*, by the owner of the soil; for appropriating it to the use of the public is not a desertion of the property. But it shall be recovered *subject to the easement*.

Norris v. Isham.  
Hutley 80.

3. An ejectment for a *manor* generally is bad, without expressing the number of acres for services belonging to a manor; for which no ejectment can lie.

Challoner v.  
Thomas.  
Yelv. 143.  
Cro. Car. 492.  
S. P.

4. An ejectment for a *watercourse*, or *stream of water*, is ill, for it is fluctuating, and of which no possession can be given: it should be of *so much land covered with water*.

Sullivan v.  
Seagrave.  
Stra. 695.

5. And an ejectment need not be for an entire thing, as it will lie for the *third part of an house*.

Hollingsworth  
v. Brewster.  
Salk. 256.

6. Ejectment will lie for a *church*: but it must be demanded by the name of a messuage. In this case, it is said that the curate may have a rule to defend *quoad* a right of entry to perform divine service; but that case has been over-ruled.

#### 2dly. OF EJECTMENT FOR NON-PAYMENT OF RENT.

Ejectment for non-payment of rent was given by statute 4 Geo. 2. c. 28. by which it is enacted, "That when half a year's rent is in arrear, and no sufficient distress to be had, and the landlord hath by law a right of re-entry, he may without any formal demand serve a declaration in ejectment, or affix it to some notorious place on the house or lands; and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, the plaintiff shall have judgment" under the following provisos: 1st, "There must be an affidavit or proof at the trial

" trial that there was half a year's rent in arrear, and no  
 " sufficient distress to be had, and that the lessor had a right  
 " of entry: 2. Lessee, or any one claiming under him, may  
 " within six months after judgment and execution, redeem  
 " the premises by paying the rent and costs, or may bring a  
 " bill in equity, otherwise he will be barred for ever; except  
 " as to bringing a writ of error to reverse the judgment in  
 " ejectment: 3. If the premises had been mortgaged by the  
 " lessee, and the mortgagee not been in possession, the mort-  
 " gagee may within six calendar months after execution, re-  
 " deem the premises on paying the debt and costs: 4. And  
 " if within the six calendar months the defendant files his bill  
 " in equity, he shall not have or continue an injunction, un-  
 " less within forty days after answer to his bill he brings into  
 " court such sum as the plaintiff or lessor swears to be due,  
 " subject to the disposal of the court. And if the tenant shall  
 " have a decree on his bill, the lessor shall be accountable  
 " only for what he really and *bona fide* received out of the  
 " premises while in his possession, and if less than the rent,  
 " the lessee shall pay the remainder before he is put into pos-  
 " session: 5. But if the defendant has a verdict or the plain-  
 " tiff be nonsuited, except for not confessing lease, entry,  
 " and ouster, in such case the defendant shall recover his full  
 " costs: 6. But the tenant may at any time before the trial  
 " pay into court the rent-arrear and costs, and thereon pro-  
 " ceedings shall be stayed."

Under this statute it has been held,

1. " That where there has been a recovery in ejectment  
 " under this statute, that after possession having been long  
 " acquiesced in, the court will presume all the forms which  
 " the statute requires to have been rightly performed."

For where in ejectment the lessor of the plaintiff had been  
 lessee of the premises in question, and twenty years before  
 they had been recovered against him by the now defendant  
 who was lessor; this ejectment was brought on the ground  
 that the proceedings in the former ejectment had been under  
 stat. 4 Geo. 2. c. 28. and that the judgment there given was  
 by default, and that there did not appear that there had been  
 an affidavit then made by the lessor of the plaintiff that half a  
 year's rent was then in arrear, and no sufficient distress to be  
 had: but the court held, That the proceedings being stated  
 to be under that statute which requires an affidavit to that  
 purpose, and the possession having been so long acquiesced in,  
 they would presume all the proceedings to have been regular.

Doe ex dem.  
 Hitchings & al.  
 v. Lewis.  
 1 Burr. 614.

2. It

Downes v.

Turner.

Salk. 597.

Phillips v. Do-  
little. Mod. ca.

2. It was formerly the practice in case of ejectments brought on an entry for non-payment of rent, to stay all proceedings on bringing the rent due into court: and this was done before the making of the statute, and after judgment.

“ And it still may be done; for the case of stay of proceedings on paying the rent and costs, seems not to be confined to proceedings under the statute.”

Pure ex dim.

Withers v.

Sturdy.

Hilary, 1752.

Buller N. P. 97.

For where in ejectment by a landlord the tenant moved to stay proceedings upon payment of the rent-arrear and costs; on a rule to shew cause, it was insisted for the plaintiff that the case was not within the act, for that it was not an ejectment founded singly on the act, but that it was brought likewise on a clause of re-entry in the lease *for not repairing*, and the lease was produced in court. But the rule was made absolute, with liberty for the plaintiff to proceed on any other title.

3. “ Under the statute the proceedings will be stayed on payment of rent and costs; but if there has been a tender before service of the ejectment, or suing out the writ, the proceedings are irregular, and will be set aside for irregularity.”

Goodright ex  
dim. Stevenfon  
v. Noright.  
2 Black. Rep.  
746.

As here where a tender of rent was made, but lessor refused to accept of it, because he had put the business into the hands of an attorney, and after proceeded in the ejectment, it was set aside for irregularity.

## 2dly, OF EJECTMENT, WITH REFERENCE TO THE PERSON.

Under this head I shall consider,

1. *By whom in general ejectment may be maintained.*

2. *By what persons in particular.*

3 Black. Com.  
206.

1. “ It is a *general rule*, that no person can in any case bring an ejectment, unless he has in himself at the time *a right of entry*; for as he is supposed to have entered with a good title on the land, and made a good lease to his fictitious lessee, the law will not suppose an entry made to make a lease whereby the title is to be tried.”

“ Therefore, where it happens that the person claiming title to the lands has *no right of entry*, he cannot maintain this action.”

As

As where the assignee of a bankrupt brought an ejectment for part of the bankrupt's estate *before the enrolment of the assignment of the bankrupt's estate made to him by the commissioners*: he was nonsuited; for the assignment is by bargain and sale, which, under stat. 27 H. 8. c. 16. is ordered to be enrolled within six months: and it is enacted by the statutes 13 Eliz. c. 7. and 21 Jac. 1. c. 19. that all the bankrupt's lands, tenements, &c. shall be sold by deed, indented, and enrolled; so that before the enrolling, the assignees have no legal title. Elliott v. Danby. Cal. K. B. 3.

But it is otherwise in the case of a common bargain and sale; for there the estate passes by the contract, and is executed by the stat. of *Uses*: but the commissioners of bankrupt have only a power which should be executed according to the statute. Perry v. Bowers. Sir Thomas Jones 196.

So where tenant in tail makes a feoffment in fee, and *thereby works a discontinuance* and dies, the issue in tail cannot enter, and therefore cannot maintain this action: and the case is the same of *other descents with toll-entries*. Litt. sec. 595.

So by common law, if the husband, seised in right of his wife, had enfeoffed another and died, this was a discontinuance, and took away her right of entry, so that she could not maintain an ejectment; but this is now altered by statute 32 H. 8. c. 28. which gives a right of entry to the wife, or her heirs, after the death of the husband, who had aliened lands and tenements of the inheritance of the wife; so that she or her heirs may now support this action.

So by stat. 11 H. 7. c. 20. it is enacted, "That if any woman having an estate in dower, or for life, or in tail jointly with her husband, or solely to her own use, but coming from him, shall alien, discontinue, &c. or suffer a recovery, such shall be void; and the husband's heir, or he who is entitled to the lands after her death may enter, and so may maintain this action."

Under this statute to enable the heir of the husband to enter upon lands of the gift of the husband, and aliened by the wife against this statute, *the remainder must have been limited to the heirs of the husband*, not to a stranger; for the statute was meant for the benefit of the husband and his heirs. Foster v. Pittfall. Cro. Eliz. 2.

2. But though a good and lawful title may, in fact, subsist in the plaintiff, yet he may be barred of his entry, and so of his power of recovering by this action, under the statute 21 Jac. 1. c. 16. which enacts, "That no person shall make an

F f

"entry

" entry into lands, &c. but within *twenty years* after his right  
 " and title shall first accrue, with the usual savings for in-  
 " fants, *feme coverts*, and persons insane," &c.

Bull. N. P. 102. Therefore if the lessor of the plaintiff is not able to prove himself, or his ancestors, to have been in possession within twenty years before the action brought, he shall be nonsuited.

Under this statute it has been held,

Per Holt, C. J. 1. That if a declaration in ejectment has been delivered  
 arg. Cal. K. B. within twenty years, and a trial had, whereby *lease, entry*  
 573. *and ouster has been confessed, if the plaintiff has been nonsuited*  
*in that action*, and brings another ejectment *after the twenty*  
*years expired*, the former confession of lease, entry, and ouster  
 shall not be sufficient to save the running of the statute against  
 the plaintiff; for there must be an *actual entry within twenty*  
*years*.

2. " The possession or entry of the lessor of the plaintiff  
 " within twenty years, which is necessary to give him a title,  
 " must be an *actual possession or entry*, not a *presumptive or*  
 " *implied one*."

Rich. ex dim. Therefore in ejectment for *mines*, the lessor of the plaintiff  
 Lord Cullen v. proved himself to be *lord of the manor*, and that he was in  
 Johnson. possession thereof. This was held to be insufficient, for the  
 2 Stra. 1142. mines are a distinct possession, and may be a different inheri-  
 tance from the manor; and no entry was proved to have been  
 made *on them* in this case within the twenty years.

S. C. So also, in the same case, a *verdict in an action of trover*  
 Buller N. P. *for lead dug out of the same mines* in favour of the lessor of the  
 102. plaintiff; was held to be not sufficient evidence of possession  
 Stokes v. Barry. to support this action; for *trover* may be brought *on property*  
 Salk. 421. *only without possession*.

3. Proof of possession within twenty years is not only ne-  
 cessary to support the title of the lessor of the plaintiff, but  
 such possession for twenty years without interruption shall be  
 a good title in itself to recover in ejectment without any other:  
 for an uninterrupted possession for twenty years is like a descent  
 which tolls an entry, and gives a right of possession which is  
 sufficient in ejectment: so that though the defendant be the  
 person who has the legal right to the premises, yet he cannot  
 justify ejecting the plaintiff who has had twenty years previous  
 peaceable possession.

Possession

Possession of *cestui que trust* is the possession of the trustee. *Roe v. Nightingale*. In this case the plaintiff could neither prove actual possession or receipt of rent by *cestui que trust*: but the judge held, That evidence of repairs done upon the premises, by the order of *cestui que trust*, and for which he had paid, was sufficient evidence of the possession to put the defendant upon going into his title. *Sitt. West. East. 1769. MSS.*

4- " So the twenty years possession which is sufficient to bar the ejectment or give a title, must be an *adverse possession*; for where it appears not to be adverse, the statute of limitations does not run."

As where a man seised in fee having issue two daughters, devised his land to his grandson by the elder daughter in fee, the elder daughter being dead; the grandson died without issue, and the heir of the grandson, who was also heir to the father, and the heir of the other coparcener entered, and took the profits of the land by *moieties* for above twenty years, supposing that the devise to the grandson was void as to one moiety; but it being discovered that the devise was good, and so that the heir of the grandson had title to the *whole of the land*, he now brought an ejectment against the heir of the other coparcener, who had enjoyed the profits with him; when it was objected, That he had by bringing the ejectment admitted himself to have been out of possession for twenty years, and so was barred; but it was resolved, That the statute of limitations never runs against a man *without an actual ouster*; that here was no possession whatever in the defendants, for the heir of the grandson had the whole by devise, and the defendant was a mere stranger, and that when two are in possession, the law will adjudge it to be in him who hath right; neither can a man be disseised of an undivided moiety: therefore as he never could have been in possession there was no ouster, and the title of the lessor of the plaintiff was good for the whole. *Reading v. Roylton. Salk. 422.*

So where a man made a mortgage as a collateral security, though the *mortgagor had continued in possession for above twenty years*, yet the interest having been paid for that time, it was held, That the mortgagee was not barred in bringing his ejectment, for there was no adverse possession, their titles being the same. *Hatcher v. Fineux. Ld. Raym. 140.*

So also in ejectments by *joint-tenants*, the possession of one joint-tenant is the possession of another so as to prevent the statute of limitation from running against the title of either. *Ford v. Grey. Salk. 284.*

*Fairclain ex dim.*  
*Empson v. Shackleton.*  
 5 Burr. 2604.  
 Co. Litt. 195. b.

SUCH also is the case of *tenants in common*; for if one of them bring an ejectment against another, there must be an ouster and adverse possession proved, in order to bar the other, or the possession of one shall be held to be the possession of the other; for the mere taking of all the profits is no ejectment, unless one drives off the cattle of the other, or keeps him actually out after expulsion.

“ And as therefore an actual adverse possession is sufficient to give a title to one tenant in common against another, what shall be deemed so, is proper matter to be left to the jury.”

*Doe ex dim.*  
*Fisher & Taylor v. Proffer.*  
 Cowp. 217.

For where the defendant's title in ejectment was a thirty-six years peaceable and *sole* possession of the lands, which he originally held as tenant in common with one *Mary Taylor*, under whom the lessors of the plaintiff claimed, and if the possession was adverse, the defendant had a sufficient title: the court were of opinion, That it was proper evidence to be left to the jury, from the presumption of so many years sole possession, whether there was not an actual ouster and adverse possession? and the jury having found for the defendant in favour of the presumption, a new trial was applied for and refused.

*Smales v. Dale.*  
 Hob. 120.

So in ejectment by tenants in common, an entry by one tenant in common shall be good for all, for he shall be supposed to enter according to his estate.

Co. Litt. 242.

“ For in general where *two persons claim by the same title*, there shall be no adverse possession so as to toll an entry of the one, but the entry of the other be at all times lawful.”

Litt. 296, 297.

As if a man dies seised in fee, leaving issue two sons; and the younger enters by abatement and dies, leaving issue, who enters on the land; in this case the eldest son, or his heir, may enter at any time on the issue of the younger; for the younger son, having entered on the land, shall be presumed to have claimed it as heir to his father; and the elder son, or his heir, claiming by the same title, his entry shall be lawful.

*Page v. Selby,*  
 per Weston,  
 Justice, *Suffex*,  
 1680. *Salk.*  
 MSS.  
*Buller N. P.*  
 102.

So where the defendant made title under the sister of the lessor of the plaintiff, as heir, and proved that she had enjoyed the lands for above twenty years, the court held it sufficient: for her possession would be construed to be by courtesy and licence from her brother to preserve the inheritance, and not to make a disheirson; but if the brother had been in possession, and the sister had ousted him, this had been



been sufficient after twenty years to have given a title to her heir.

"Therefore where one party claims *under or through the* other, there shall be no adverse possession in such case sufficient to give a title."

As if a cottage has been built in defiance of the lord, and a quiet possession had for twenty years, it is a good title within the statute as against the lord; but if it was built at first with the lord's permission, or any acknowledgment had since been made (though it was one hundred years since) the statute will not run against the lord, for the *possession of a tenant at will, for ever so many years*, is no disseisin; there must be a tortious ouster.

Bishop v. Edwards.  
per Powell, Just.  
Buller N. P.  
103.

"And wherever an adverse possession is relied on, it seems that there should be some proof of an actual ouster; for presumption of adverse possession from circumstances shall scarcely be deemed sufficient."

As if the defendant should *prove receipt of rent by a stranger*, it is no evidence of possession, so as to take it out of him in whom the right is; and it is the same though *he makes a lease to the tenant reserving rent*, unless he has made an actual entry; and it is the same though the tenant declares that he is in possession for the stranger, though it may be proper evidence to be left to a jury, especially if the stranger has any colour of title.

1 Roll. Ab. 659.  
tit. disseisin.  
Buller N. P.  
104.

And note, That where the ejectment is grounded on a clause in a lease giving a right of re-entry for non-payment of rent, actual entry is there not necessary.

Goodright ex  
dum. Hare v.  
Cator.  
Douglas 460.

2. As to the particular persons who may maintain this action.

1. "The mortgagee may maintain this action to obtain possession of the mortgaged premises or estate."

"But a distinction is to be observed where the ejectment is against the tenant of the lands under a lease made prior to the mortgage, and where against the mortgagor himself, or against a tenant in possession under a lease or demise made subsequent to the mortgage."

Where lands are let for years and afterwards mortgaged, the tenant's possession is protected, and he cannot be turned out by the mortgagee: but the courts now permit the mortgagee to proceed by ejectment against the tenant in possession, if he has given notice to him before the action that he does not mean to disturb his possession, but only requires the rent to be paid to him; and not to the mortgagor.

Per Lord Mansfield.  
Douglas 269.  
White v. Hawkins.  
quot. Douglas  
23.

But

**Keech v. Hall.**  
Douglas 21.

But if the ejectment is against the mortgagee, or his tenant *under a lease made subsequent to the mortgage*; in such case the mortgagee may recover the premises absolutely without any notice whatever to the tenant in possession: for as by the mortgage the mortgagor becomes strictly a mere tenant at will, no notice is ever given to him to quit; he is not even entitled to the crop as other tenants at will are, because all is liable to the debt; on payment of which all the mortgagee's title ceases. He therefore has no power, either express or implied, of making leases not subject to every circumstance of the mortgage. Under these circumstances, therefore, he is at all times liable to be put out of possession, without any notice or demand whatever.

**Smartle v. Williams.**  
Balk. 245.

And if the mortgagee assigns the mortgage, and the assignee assigns to another, *this last assignee may maintain an ejectment for the mortgaged premises*; for on the execution of the mortgage-deed, the mortgagor becomes as tenant at will, and by the assignment, though he becomes tenant at sufferance, yet his continuing in possession can never make a disseisin or divesting of the term, and so an ejectment can well be maintained.

**Anon.**  
1 Stra. 413.

But if after the day of payment elapsed, the mortgagee brings his ejectment, the court will stay proceedings on payment of principal, interest, and costs.

**Goodtitle ex  
dim. Norris &  
al. v. Morgan.**  
1 Term Rep.  
755.

A *second mortgagee* who has taken an assignment of a term to attend the inheritance, and has all the title-deeds, and who had no notice of the first mortgage, may maintain an ejectment for the mortgage-lands *again*: *the first mortgagee*: for it was the duty of the first mortgagee to have taken the title-deeds to accompany his mortgage, as by leaving them in the hands of the mortgagor, he enables him to commit a fraud; and as the second mortgagee is a purchaser without notice, he is entitled to a preference.

2. "*The devisee of a term for years may maintain ejectment to recover the term devised: but it is necessary to shew the assent of the executors to the devise.*"

**Young v.  
Holmes.**  
1 Stra. 70.

As where the lessee for years devised his term to his executor for life, paying fifty pounds to J. S. remainder to the lessors of the plaintiff; the executor died, and his executrix possessed herself of the term; on ejectment being brought it was held, That the executor took the term *as executor*, and so that the remainder over to the lessors of the plaintiff was not executed, and that it was therefore incumbent on him to prove a special assent thereto as to a legacy: but upon proof of payment of the 50l. legacy, charged upon the term in the hands

hands of the executor, that was held to be sufficient proof of the assent; and the plaintiff had a verdict.

" But in the case of the devise of a *freehold*, the devisee may immediately, and without any possession, maintain an ejectment for the lands devised: for after the testator's decease the law casts the freehold on the devisee; and even should the heir enter and die seised, and a descent be cast, yet may the devisee enter, and so maintain an ejectment; for otherwise he would be without remedy."

3. *Conusee of a statute merchant* may bring an ejectment, but then he must prove a copy of the statute, and the returns of the *capias si laicus*, the extent & liberate.

For though by the return of the extent an interest vests in the *conusee*, yet the actual possession is under the *liberate*; and without such right of possession this action is not maintainable.

4. "*Tenant by elegit* may maintain this action to be put into possession under the elegit, of the lands returned by the inquisition before the sheriff."

But he should prove the *judgment*, the *elegit* taken out on it, and the *inquisition and return* thereon, by which the land in question has been found: and it should appear that the elegit had been lawfully executed; for if more than a moiety has been extended, the execution is void, and an ejectment cannot be maintained on it, nor the possession recovered on this title.

But in executing an elegit the sheriff is not bound to deliver a moiety of each particular tenement and farm, but a valued moiety of the whole; for as he is to deliver possession by metes and bounds, by such means only can a complete execution be made.

5. " Assignees of a bankrupt may maintain an ejectment for lands which belonged to the bankrupt."

1. For by the assignment all the bankrupt's property, real and personal, is vested in the assignees, under stat. 13 *Eliz.* 7.  
f. 2. and therefore they must be invested with all the powers necessary to get into possession.

But the assignment shall only operate on the lands in the bankrupt's possession at the time of the assignment made; but lands which he shall purchase during his bankruptcy, or which shall descend to him, or in anywise come to him during that time,

Co. Litt. 240. b.

Woodv. Palmer,  
Per Blencowe,  
at Dorchester,  
1699 Salk,  
1188.

Buller N. P.  
104  
Hammond v.  
Wood.  
2 Salk. 563.

Douglas 456.  
Buller N. P.  
104.

Lord Raym.  
718.  
Putten v.  
Purbeck.  
Salk. 563.

Den ex dim.  
Taylor v. Lord  
Abingdon.  
Douglas 456.

Ex parte Proud-  
foot.  
1 Atk. 253.

time, must be conveyed to the assignees by a new deed, *stat.* 13 *Eliz.* 7. *f.* 11.

Therefore if an ejectment is brought by the assignees for lands which may have come to the bankrupt after his bankruptcy, and before the allowance of his certificate, they should give in evidence a special conveyance of this part.

2. A sale by the commissioners of *lands of which the bankrupt is seised in tail*, by deed inrolled, shall have the same effect to bar the intail as if a recovery had been suffered of them, by *stat.* 21. *f.* 12.

*Beck ex dim.*  
*Hawkins v.*  
*Walsh.*  
*1 Will.* 276.

And where the bankrupt who was seised in tail, had made a mortgage before his bankruptcy, but had neglected to suffer a recovery, and died after his bankruptcy, upon which this ejectment was brought by the assignees, and held that the tenant in tail, not having suffered a recovery, was only tenant for life, and the mortgage-title at an end, and that they should recover; it was moved in the case, That as the assignment by the commissioners had the same effect as a recovery, and as in case the bankrupt had suffered a recovery, that it would let in the mortgage, that therefore the assignment should; but it was resolved, That the statute was made for the benefit of the creditors who had no specific lien on the lands of the bankrupt, and that it would be absurd that this statute should have a contrary effect, to make good a defective title to a particular creditor to the injury of the rest.

*Jemott v.*  
*Cowley.*  
*1 Saund.* 112.  
*Sid.* 223. S. C.

6. If a *rent-charge be granted to any one*, with a proviso that if the rent be in arrear that it shall be lawful for the grantee, his heirs and assigns, to enter and hold the lands out of which the rent-charge is granted till he shall be satisfied of the arrears: this shall give to the grantee of such rent-charge such an interest, that he may maintain an ejectment for the lands; for the law does not give to any body an interest without a remedy; and if grantee has a right to hold such possession, he ought to have this action by which it may be gained.

*Rocks v.*  
*Darfon.*  
*Hob.* 215.  
*Anon.*  
*Hutt.* 16.

7. *The committee of a lunatic* cannot bring an ejectment in his own name for the lands of the lunatic; it should be in the name of the lunatic, for the interest and estate still remain in the lunatic, and the committee is but as bailiff.

*Knipe v. Palmer.*  
*2 Will.* 130.

And for another reason, that the committee of a lunatic cannot make leases of the lunatic's land, and so cannot make the necessary demise in ejectment.

8. *An infant* may maintain an ejectment; but he must name a good plaintiff, who may be answerable for the costs. Nokes v. Windham.  
1 Stra. 694.  
2 Stra. 932.

9. *Executors* may maintain an ejectment for land let to their testator for years, *if the testator is ousted*; for by stat. 4. Ed. 7 H. 4. 6, b. 4. c. 6. an action is given to executors for goods taken out of their testator's possession, and the act extends to this case, because the term itself is recovered. S. P.  
4 Co. 94. a.  
2 Vent. 20.

So if the *executors themselves* of the lessee for years are ousted, they may either have a special writ on the case (*F. N. B. 92. Reg. 97.*) or maintain an ejectment. 4 Co. 95. a.

Where *the tenant from year to year* as long as the lessor and lessee pleased, died, it was adjudged, That *his administrator* might maintain an ejectment; for it was a chattel-interest, and the administrator has the same interest which the intestate had. Doe ex dim. Shore v. Porter.  
3 Term Rep. 13.

So if the spiritual court grant an *administration pendente lite*, such an *administrator* may maintain an ejectment. Per Lord Hardwicke  
2 Atk. 286.

10. "*An alien* cannot maintain an ejectment; for an alien cannot take lands by descent." Co. Litt.

As to the issue of aliens, and children born out of the realm, it is settled,

By stat. 25 Ed. 3. f. 2. Children whose fathers and mothers at the time of their birth should be liege subjects of England, are to be inheritable to lands within the kingdom, though such children were born out of the kingdom.

And by stat. 7 Ann. 5 & 4 Geo. 2. f. 4. it is enacted, "That all children born out of the ligeance of the crown of Great Britain, whose fathers are natural-born subjects, shall be deemed natural-born subjects, and so may inherit lands."

But where *the mother is a natural-born subject*, and the father an alien, in such case a child born abroad cannot take lands by inheritance, even though the lands came by descent from the mother. Doe ex dim. Duceaux v. Jones.  
4 Term Rep. 300.

11. When a *corporation aggregate* bring ejectment, they should give a letter of attorney to some person to enter and seal a lease on the land, for they cannot enter and demise on the land as natural persons; and such demise should be declared on. Buller N.P. 98.

"But it seems doubtful whether this now is necessary: as all events it is cured by a verdict."

For

Patrick v.  
Balls.  
1 Lord Raym.  
136.

For where in ejectment the plaintiff declared on a demise by the aldermen and burgesses of *Bury*, but without setting out *that the demise was by deed, or under the seal of the corporation*: on a writ of error brought, this was assigned for error, but it was held to be well enough; for this being a fictitious action, the demise need not now be set out to be by deed.

“ So *corporations sole* may bring ejectment.”

Read v. Allen.  
Per Comyns, at  
Oxford, 1730.  
Buller N. P.  
108.

As where the copyholders of a manor belonging to a bishopric, during the vacancy of the see, committed a forfeiture by cutting timber, *the succeeding bishop* was allowed to maintain an ejectment for the lands so forfeited.

Liti. l. 77.

10. If a *copyholder* is ejected by his lord, he can maintain an ejectment against him; for though he is called a tenant at will, yet it is according to the custom of the manor, and the copyholder cannot be put out while he performs his services.

Anon.  
1 Leon. 4.  
Goodwin v.  
Longhurst.  
Cro. Eliz. 535.

But in such case it seems to be necessary that the copyholder *is warranted to make leases either by the custom of the manor, or by licence of the lord*; in which case he may clearly have this action.

Spark's case.  
Cro. Eliz. 676.  
Co. Copyh. sect.  
51.

And even *without a custom* to warrant such leases, in the case of an ejectment, the copyholder could maintain this action *against all persons except the lord*.

Melwich v.  
Luter.  
4 Co. 26. a.

So if the *lessee of a copyholder* is ejected by a stranger, he may have this action.

“ So also the lord shall in this action recover the copyhold, where the copyholder has committed a forfeiture.”

Peters ex dim.  
Bishop of Win-  
chester v.  
Mills.  
Per Tracy  
Bar. 1707.  
Buller N. P.  
107.

And in such case where the plaintiff makes title in the lessor as lord of the manor, he ought to prove that his lessor is lord, and the defendant a copyholder, and that he committed a forfeiture; but the presentment of the forfeiture need not be proved, nor the entry, nor the seizure of the lord for the forfeiture.

Buller N. P.  
107.

If the ejectment is brought against the lessee for years of a copyholder (relying on the lease as a forfeiture) the plaintiff must prove an actual admittance of the copyholder, and it will not be sufficient to prove the father admitted, and that it descended to the defendant's lessor as son and heir, and that he had paid quit-rents; for an actual admittance should be proved, for nothing vests in him before admittance and an actual entry, so that a lease made under those circumstances would be void; for a copyholder

holder cannot make a lease before admittance, except to try a title.

But if a copyhold is surrendered to one for life, remainder to another in fee, the admittance of the tenant for life is the admittance of him in remainder, though he himself never was admitted; for both make but one estate. *Anselm v. Anselm. Cro. Jac. 31.*

So where a widow is entitled to her free-bench after the death of her husband, she may maintain an ejectment before admittance; for it cometh out of the husband's estate. *Jurden v. Stone. Hutt. 18.*

But in the case of a *surrender*, no complete title vests in the surrenderee *till admittance*, for till then it remains in the surrenderer; and if he dies it is so much in him that his heir may maintain ejectment. *Wilson v. Weddell. Yelv. 144.*

But if a surrender is made, the admittance shall relate to that time, so that surrenderee may recover on a demise laid between the time of surrender and admittance. *Holdfast v. Dimmock. Clapham. Hill 27. G. 3. Term Rep. 608.*

## 3. OF SERVING THE EJECTMENT.

1. If it is known where the tenant lives, he should be *personally served* with the ejectment, if he does not live on the premises for which the ejectment is brought. And therefore in this case where the attorney for the plaintiff *knew where the defendant lived*, but did not serve him, it was held to be irregular. *Savage v. Dent. 2 Stra. 1064.*

So where the ejectment is for non-payment of rent, the words of stat. 4 Geo. 2. c. 28. are "That the lessor may without any formal demand or re-entry *serve* a declaration in ejectment; or in case the same cannot be legally served, or no tenant be in actual possession, then affix the same upon the door of any demised messuage; or in case there be no messuage, then upon some notorious place on the lands." *Buller N. P.*

"In proceedings therefore under this statute, or at common law, the lessor of the plaintiff must proceed by personal service, if possible."

And therefore where the lessor of the plaintiff in this case proceeded, as if the possession was vacant (that is, by sealing a lease as on a vacant possession, delivering an ejectment and signing judgment) and it appeared that at the time, though the lessee had quitted the house and removed his goods and family, yet that he had left some beer in the cellar, this was held to be such a possession as to make the proceedings which had *Savage v. Dent. ante.*

had been as if the possession had been vacant, irregular; and they were set aside.

Goodright ex  
dim. Wadding-  
ton v Thruft-  
out.  
2 Black. Rep.  
800.

2. But if the tenant himself cannot be found, then service on a wife or servant on the premises shall be sufficient; if on the wife it is sufficient; but if the service is on the servant, in that case there should be *some acknowledgment* from the tenant that he received it.

Anon.  
Salk. 255.

As where the service was on a servant, and the tenant is a letter to the lessor of the plaintiff's attorney acknowledged the receipt of it, and begged his interference to prevent the plaintiff's lessor from proceeding.

3. "So in all cases where the tenant cannot personally be served, the court will by rule of court order particular service of the ejectment to be good, so as to give a good judgment to the plaintiff."

Knightly ex  
dim. Collins v  
Dunch.  
2 Burr. 1106.

As where on affidavit that the tenant in possession had absconded, and that a declaration in ejectment had been served on a person in the house, and another copy fixed to the premises, the court thought it sufficient service, and made a rule on the tenant in possession to shew cause why judgment should not be entered against the casual ejector.

Fenn ex dim.  
Tyrrel v. Denn.  
2 Burr. 1181.

So where the rule was to shew cause why the service of the ejectment which had been made upon a woman who called herself *M. Campbell* (then in the house) should not be deemed good service, and why the lessors of the plaintiff should not be at liberty to enter up judgment against the casual ejector; this rule was made absolute on an affidavit that *M. Campbell* was either not at home or denied, but that a copy of the rule was affixed to the door, and another thrown in at the window.

Goodright ex  
dim. Methold v.  
Wright.  
2 Burr. 1161.  
In marg.

So on an affidavit that *one Hawkins and his wife both kept out of the way, to prevent their being served with the ejectment personally*, a rule was made that service on a servant in the house of *Hawkins* should be sufficient.

Douglas v.  
1 Stra. 755.

So leaving the ejectment at the house was ruled to be sufficient service, it appearing that the servant had refused to receive it, by order of his master.

Buller N. P. 98.

4. "If there are several tenants of the premises, there must be a declaration in ejectment delivered to each of them."

Lill. Pr. Reg.  
499.

And the person who swears to the service of the ejectment, must swear positively that such a one is tenant in possession: that he read the indorsement to him, and acquainted



quainted him with the contents thereof; and upon this affidavit the plaintiff moves for judgment against the casual ejector, which is granted, unless the tenant enters into the usual rule to confess lease, entry, and ouster.

But in such case, though the title is the same, the court *will not consolidate the declarations, and make one issue of them*; for it would be making the plaintiff go on against all the defendants, when he might be ready in some of them only. *Smith v. Crabb. 2 Stra. 1149. and note.*

5. If the declaration in ejectment is delivered before the effoign-day of the issuable terms, the tenant is bound to plead within eight days in that term, without further notice: but if the declaration is not served before the effoign-day of the other terms, the party is not bound to plead without motion made, and a rule obtained in these respective terms.

And when the declaration was delivered after the effoign-day of *Michaelmas* term, the plaintiff let that term pass without doing any thing, and also *Hilary* term, till the last day, when he moved for a rule to plead, and for want of a plea signed judgment: the court set it aside, for when the plaintiff lets an whole term elapse, he must give a new notice. *Annon. Salk. 257.*

For the notice to appear to an action of ejectment must be to appear in the next term, after that of which the declaration is. *Armstrong v. Thrutout Sayer's Rep. 49.*

6. By stat. 11 Geo. 2. c. 19. "The tenant must give notice to his landlord of any declaration in ejectment served on him, under penalty of three years rent."

But this statute does not extend to cases where the ejectment is brought by the mortgagee to be put in possession of the mortgaged premises, without disturbing the lessee's possession, but only to have his attornment. The statute only extends to cases where the ejectment is on a title adverse to that of his landlord. *Buckley v. Buckley. East. 27 G. 3. Term Rep. 647.*

And where the tenant had not given notice to his landlord of the ejectment, and there was judgment against the casual ejector, the court set aside the judgment, and ordered the tenant to pay all the costs to the lessor of the plaintiff on the landlord's entering into the usual rule to try the title: or the landlord may bring a writ of error, which will be a supersedeas of the proceedings under statute 11 Geo. 2. and stay the proceedings. *Doe v. Roe ex dim. of Troughton. 4 Burr. 1996. Jones v. Edwards. 2 Stra. 1245.*

After service of the ejectment, the defendant should, in case he means to defend the title, appear and confess lease, entry, and ouster, which brings the title only into issue; after which the plaintiff is to declare.

#### 4. OF THE PLEADINGS.

##### I. ON THE PART OF THE PLAINTIFF.

##### 1. With respect to the Things for which this Action lies.

1. "The declaration should always be according to the plaintiff's title and set it out as it is, and shew a good and subsisting one in him at the time of the ejectment brought.

Goodgain v.  
Wakefield.  
1 Sid. 7.  
Macdonnell v.  
Welder.  
1 Stra. 550.

For where the plaintiff declared, "That the said J. S. (the lessor of the plaintiff) on the 24th day of June, 1650, had demised the premises to him, to hold from the said 24th of June, by virtue of which on the day and year last mentioned he had entered, and that the defendant afterward (to wit) on the 24th of June, had evicted him; this was held to be bad, for, from being exclusive, the lease did not commence till the 25th of June, so that he was a disseisor by his entry; and so the plaintiff had laid the commencement of his lease before his title accrued: but it would be good in replevin.

"And therefore the demise by the lessor of the plaintiff must always be laid after his title has accrued."

Roe ex dim.  
Wrangham v.  
Herley.  
3 Will. 274.

For where the ancestor of the lessor of the plaintiff, under whom he derived, died at five o'clock in the morning of the first of January, and the demise laid was on that day, it was insisted, that as the law admits no fraction of a day, that the estate for the whole day was in the lessor of the plaintiff's ancestor, and so that lessor himself had no title to demise at the time laid in the declaration; but the objection was overruled, for the allowance of the fraction of a day is a fiction in law, which never does wrong.

Goodtitle  
ex dim. Gallaway v. Herbert.  
4 Term. Rep. 689.

But where the defendant had been tenant at will to the lessor of the plaintiff, possession had been demanded and refused on the 5th of October; an ejectment was brought, and the demise laid the 1st of October; it was adjudged that the plaintiff could not recover, for the tenancy was not determined on the day of the demise laid in the declaration.

Basset & Basset.  
16 Dec. 1744.  
In Canc.  
Buller N. P.  
105.

So where the ejectment was brought by a posthumous child, and the demise laid from the death of his father, Lord Hardwicke was of opinion that it was good, and that the defendant

dant was estopped to say that the lessor of the plaintiff was not born at the time of the demise laid, by stat. 10 & 11 W. 3. c. 16.

"But it is not necessary to lay any day certain upon which plaintiff entered; it is sufficient to lay a demise, and then say in general *that he afterwards entered*: for so are the precedents."

And if the term demised to the plaintiff is expired, or likely to expire, before trial, the court will upon motion *enlarge the term*, though former practice would not allow it.

Roe ex dim.  
Lee v. Ellis.  
2 Black. Rep.  
940.  
Salk. 257.

2. "The declaration should state the ejectment by the defendant as done *subsequent to the date of the supposed lease made to him by the lessor of the plaintiff*; for otherwise the ejectment, which is the injury complained, would precede the time of the accruing of the plaintiff's title, and so there would be no cause of action; as in *Goodgain v. Wakefield*, ante 444.

But though this is the right and proper form of declaring, yet this being a fictitious action, it is not fatal if laid otherwise: for cases have occurred in which the ejectment has been laid prior in point of time to the demise, and yet the court held it to be good; that is, where the plaintiff declares on a certain demise, and that defendant *afterwards* ejected him, and then under the *viz.* mentions a day prior to the demise, in which case the *viz.* being inconsistent with the *afterwards*, shall be rejected as surplusage.

Buller N. P.  
106.

As where the plaintiff in ejectment laid his lease on the 6th of September, 2. Jac. and that the defendant, *postea viz. on the 4th of September*, 2 Jac. did eject him. Objection being taken on the ground of the ejectment being laid precedent to the demise, the court nevertheless held the declaration good, the time laid under the *viz.* being inconsistent and repugnant.

Adams v.  
Goole.  
Cro. Jac. 96.

So where the plaintiff in ejectment declared on a lease, dated 1 Feb. 1742, to hold from the 8th of January before, and that afterwards, *viz. on the 28th of January* defendant had ejected him; it was insisted for the defendant, that the ejectment was laid before the plaintiff's title under the lease, which was not made till the first of February; and 1 Sid. 7. was quoted: but the court held, that the day of the ejectment being laid under a *videlicet*, was surplusage, and should be rejected, and that *afterwards* should relate to the time of making the lease.

Swimmer ex  
dim. v. Gros-  
venor, Bart.  
Salop. Ass.  
1752.  
Buller N. P.  
106.

For the plaintiff in his declaration need mention *no particular day of the year*, so that it appears to be before the action brought;

Merrell v.  
Smith.  
Cro. Jac. 311.

brought, and, after the term commenced; though in the precedents a certain day is always laid.

3. "These are cases of repugnancy before a trial; but a verdict will cure almost all repugnancies, except such as affect the title."

Small ex dim.  
Baker v. Cole  
& Skinner.  
a Burr. 1159.

As where the plaintiff declared on a lease made in *the thirty-third of the reign of king George the Third*, which was an impossible time, the ejectment being *in the first year* of that king, plaintiff had a verdict; and this being moved in arrest of judgment, the court held it to be amendable.

"But if the fault goes to the title, or is in the process, it is not amendable."

Goodtitle v.  
Meymot.  
2 Stra. 1211.

As where in the declaration delivered to the tenant in possession, the said *James* instead of *John* was said to enter by virtue of the demise; the court refused to amend it, for they considered it as process. And justice *Wright* cited a case of *Hill. 15 G. 2.* where the premises were said to lie in *Twickeham or Iffsworth, or one of them*; and the court refused to let the plaintiff amend, by striking out the disjunctive words.

4. "The declaration in ejectment should state a certain quantity, and the nature of the land to be recovered; as arable, pasture," &c.

Ed. Savill's  
case 11 Co. 55.

For where the ejectment was for a messuage and close, containing three acres, and verdict for the plaintiff, the judgment was arrested, for it was not sufficient to state the *quantity only*, without also setting out the nature as arable, meadow, &c.

"And so it is not sufficient to set out the *nature only*, without also setting out the *quantity*."

Holdfast v.  
Wright.  
Mich. 12 G. 1.  
C. B.  
Buller N. P.  
109.

For where the ejectment was for a close of meadow called *Partridge's Lees*, containing ten acres, more or less, it was held to be ill; for the quantity of acres ought to appear in the declaration.

Knight v.  
Symes.  
Salk. 254.

And in like manner where the ejectment was for five closes of arable and meadow, called ———, containing twenty acres in *D*: upon *not guilty* pleaded, and verdict for the plaintiff, the judgment was arrested, because it was not shewn how much there was of one, and how much of the other.

"For an uncertainty in these respects in the declaration is an incurable fault."

As where the ejectment was for seven messuages or tenements, the declaration was held to be ill, for the uncertainty of whether they were messuages or tenements: And though in a modern case the demise was so laid to be of a messuage or tenement, and the court were well inclined to get over the objection, yet they held themselves bound by former decisions to adjudge the uncertainty to be incurable.

Burbury v. Yeomana. Sid. 295.  
Goodright ex dim. Welk v. Ford. 3 Will. 23.

But if the ejectment was for one messuage or tenement, *Per Twissden called the Black Swan*; it had been good, for the last words fix it to a sufficient degree of certainty.

Per Twissden Just. 1 Sid. 295.

“ But the plaintiff is not bound to declare for the *exact* quantity which he has a right to recover.”

“ For he may declare for any indeterminate quantity; and the form now used is so, *viz.* one thousand acres of pasture,” &c. And he shall recover according to the quantity to which he proves a title.

As where the plaintiff declared in ejectment for one hundred acres of land, and shewed his lease in evidence, which was only of forty acres, and it was contended that he had failed in his case, for there was no such lease as that on which he had declared; but it was ruled to be good for so much as was comprized in the lease, and for the residue, that the jury might find the defendant not guilty.

Guy v Rand. Cro. Eliz. 13.

So if the plaintiff declares for any thing, and proves a title to but a moiety, he shall only recover so much: as where it was for an house, and the proof only went to shew that part of it was built on the plaintiff's land by encroachment, he recovered so much as was so built on his land.

2 Roll Ab. 734. Id. 719. Goodwin v. Blackman. 3 Lev. 334.

But though the plaintiff may thus recover in ejectment *less than he declared for*; yet if he proves a title to more than he has declared for he shall not recover it, for he can recover no more than he goes for in his declaration.

Doc ex dim. Burgess v. Purvis & al. 1 Burr. 326.

“ So though the plaintiff declares for a *time longer than he has a right to recover*, yet he shall recover according to what his title really is.”

For where the plaintiff declared on a lease for seven years from the 25th of March 1765. In proof it appeared that F. S. who was seised in fee, had demised the premises in question for seven years to D. in 1763, and that he in 1764 had assigned the unexpired residue of his term to Carruthers, so that if he recovered in this action, under this demise, he must recover for two years longer than he had a title. But, *per Lord Mansfield*, if the lessor of the plaintiff has a title,

Bedford ex dim. Carruthers v. Dendien. Sittings after Trin 5 G. 3. Bull. N P. 106.

thought but for one week, he ought to recover it, for the true question in ejectment is, who has the possessory right? And therefore in this case the plaintiff should recover accordingly.

1 Burr. 629.

5. "But a very exact description of the nature of the land is not required, and greater latitude is now admitted than formerly; because the lessor of the plaintiff is to shew the lands to the sheriff, and to take possession of them at his peril."

Therefore descriptions of certain kinds of land of local use, have been held to be good.

Lord Kildare v. Fisher.  
1 Stra. 71.  
Ibid.

As where it was for one hundred acres of mountain in Ireland; it was held to be good.

So for *beg* in the same kingdom.

Barns v. Peterfon.  
2 Stra. 1063.

So for *alder carr* in Norfolk.

And in many other instances.

Sir Henry Harpur's case.  
11 Co. 25. b.  
Swaddling v. Peers.  
Cro. Jac. 613.  
Denied 1 Ld. Raym. 135.

6. In ejectment for *tithes*, under statute 32 H. 8. it is not sufficient to declare for all and every kind of *tithes* in such parish, it should specify the particular nature and quality; as of hay, wool, &c. in like manner as in declaring for land it is necessary to shew the quality; for the words of the statute are to that effect.

"So the ejectment should state the demise to have been made by deed."

Angel v. Rolfe.  
2 Keb. 376.

For where the ejectment was for tithes, not saying by deed, the judgment was reversed.

## 2. With respect to Persons who may maintain this Action.

1. "If the declaration states the demise to the plaintiff to be of several lessors, it must appear that each had a title to the whole of the land or the premises demised, or the declaration will be bad. For if one has not an interest in the whole, he cannot be said to demise it."

Treport's case.  
6 Co. 14 b.  
King v. Berry.  
Poph. 57. S. P.

Therefore where in ejectment the plaintiff declared on a lease made by A. & B. and on *not guilty* pleaded, the jury found a special verdict, That A. was tenant for life of the land in question, and B. had the remainder in fee, and that A. was living. On this findings, it was adjudged against the plaintiff, for it was not the lease of A. and B. but the lease of A. during his life, and the confirmation of B.

Mantle v. Wollington.  
Cro. Jac. 166.

2. Therefore, on the same principle, if tenants in common join in a lease of their land to bring an ejectment, it will be bad;

bad; for they are in by several titles, and therefore the freehold is several, and consequently each cannot demise the whole. So that there should be a *distinct count on the demise of each*, or they may join in a lease to a third person, and such person may make a lease to try the title.

Co. Litt. 209. a.  
Heatherley es-  
dim.  
Worthington v.  
Weston.  
2. Will. 232.  
S. P.

But *joint tenants* may join in a lease to try the title in ejectment; for being *seised per my et per teus*, each has a title to the whole, and so his demise of it is good.

Moore v. Purf-  
den, Show. 342.  
Morris v.  
Barry.

And for the same reason *coparceners* may join in a lease to the plaintiff in ejectment; but the usual mode is to join in a lease to a third person, who demises to the plaintiff; for a demise of all the parts is a demise of the whole.

2 Stra. 1181.  
1 Will. 1. S. C.  
Boner v. Juner.  
1 Ld. Raym.  
726.  
2 Keb. 700;

3. *Husband and wife* may join in a lease to the plaintiff in ejectment, without saying that it was by deed, though formerly held to be necessary.

Wilcot's case,  
2 Co. 61.

4. Where the lessor of the plaintiff claims by lease under a *copyholder*, he must shew, that by the custom of the manor, the copyholder may let such leases for years: and if this be not set out in the declaration, and the count be general, it shall be esteemed a lease at common law, which a copyholder cannot make.

Wells v.  
Partridge,  
Cro. Eliz. 469.  
717.

5. If the plaintiff declares as *administrator*, he may declare generally that administration was granted by the bishop of —, without saying that he was ordinary, or had the right of granting administration.

Dorrell v.  
Collins,  
Cro. Elm. 6.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "The tenant in possession must apply to the court to be made defendant, in the room of the casual ejector. This is done by rule of court, on condition of his confessing lease, entry, and ouster."

But if the defendant does not appear at the trial and confess lease, entry, and ouster, the plaintiff must be nonsuited, as he cannot *prove* any of these requisites; and then upon return of the *posse* judgment is given against the casual ejector, and it is indorsed on the *posse* that the nonsuit was *for not confessing lease, entry, and ouster*. Upon this the plaintiff is intitled to have his costs taxed against the defendant; and if they are not paid, an attachment will go.

Turner v.  
Barnaby  
Salk. 259.

If there are several defendants, and some of them do not appear and confess lease, entry, and ouster, a verdict will be taken for them; and then the plaintiff shall have judgment.

Claymore v.  
Searle,  
1 Ld. Raym.  
729.

*Ellis v. Knowles*. ment against the casual ejector for the lands of which these de-  
*Harnes*. 118. fendants were in possession.

2. By stat. 4 H. 7. 24. "Where a fine has been levied of lands, unless an actual entry is made to avoid it within five years, it shall be a complete bar to all persons whatever, except *femes covert* (not parties to the fine) persons under the age of twenty-one years, in prison, in parts beyond the sea, or of *non sane* mind, who have five years to make their claim and entry after their disabilities removed.

"But if the five years begin to run while the party is not under any of the disabilities mentioned in the statute, though he afterwards becomes disabled, yet shall he be barred by the statute."

*Doe ex dim.*  
*Duroure v.*  
*Jones*.  
 4 Term Rep.  
 300.

For where the lessor of the plaintiff was an infant when the fine was levied, which was in *Trinity Term 1775*, but came of age in *Feb. 1784*, and in *Dec. 1784* was imprisoned for debt, and so continued till 1789, when the ejectment was brought, it was resolved, That not having made an entry when he came of full age, that the statute ran against his claim, though so soon after another disability incurred.

2. "And an actual entry must be made."

*Holdfast v. Roe.*  
*Worcester Sum.*  
*Aff. 1757 MSS.*

In this case the ejectment was by trustees in a marriage-settlement, in whom a term was vested for raising children's portions: the person in possession claimed under a mortgage subsequent to the term, in which was a covenant to levy a fine, and a fine levied accordingly: it was objected that the plaintiffs could not recover, not having made an entry; and, *per Baron Smythe*, the trustees were clearly intitled to avoid the fine by entry; but by the fine their estate was divested, and they cannot maintain an ejectment before entry; so the plaintiff was nonsuited.

3 Burr. 1897.  
*Jenkin v.*  
*Prichard*.  
*Mich. 30 G. 2.*  
*C. B.*  
*Bul. N. P. 103.*

And where the ejectment is for lands which have been passed by a fine, the confession of lease, entry, and ouster, by the tenant is not sufficient, the lessor of the plaintiff must make an actual entry; and ordering one to deliver a declaration in ejectment to the tenant in possession will not amount to an entry sufficient.

*Berrington v.*  
*Parkhurst*.  
 2 Sira. 1086.

Therefore where, to avoid a fine, lessor of the plaintiff made an entry, but having brought his ejectment, he laid the demise three months before his entry. It was adjudged that an actual entry being necessary to avoid a fine, and give him title; and he having laid the demise before his entry, that he had then no title, and so could not recover.

*Musgrave*  
*ex dim.*  
*Hilton v. Sir*  
*Jno. Shelly,*  
*Wilf. 214.*

But where the lessor of the plaintiff made an actual entry on the lands in *September, 1744*, and laid his demise in ejectment



ejectment in *October* of the same year, though a fine was levied by the defendant of these lands in *Easter Term*, 1745, it was adjudged, That the entry being *precedent to the fine*, that it was sufficient to enable the lessor of the plaintiff to make a lease to try the title.

"In other cases the confession of lease, entry, and ouster 3 Burr. 1897. is sufficient; as if the ejectment is brought for a condition broken, it is sufficient."

For where the ejectment was brought by the lessor against the lessee, on a condition of *re-entry for non-payment of rent*, proof of an actual entry and ouster was held to be not necessary. *Little v. Houghton*, 3 Burr. 1897. *Falk. 259.* *Dougl. 460.*

So where the ejectment was by one tenant in common against another, proof of an actual ouster was held to be not necessary, and that the confession of lease, entry, and ouster was sufficient to prevent a nonsuit. *Oates ex dem. Wigfall v. Brydon*, 3 Burr. 1895.

But in the case of tenants in common, if in fact there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or permit him to do it specially; which the court will do where it is only matter of account, and the only ouster is by perhancy of the profits, without an actual obstruction of the other to occupy. *S. C. Buller N. P. 109.*

And the levying a fine by one joint-tenant is not an ouster of his companion. *Ford v. Gray*, Salk. 286.

In delivering the opinion of the court in *Goodright v. Cater*, Dougl. 468, Lord Mansfield says, That in the case of a fine only is an actual entry necessary to be proved. But the reporter makes a *quære*, and that the doctrine is contrary to Lord Mansfield's own doctrine in *Burr*, 1897, where he mentions that an actual entry is necessary to prevent the operation of the statute of limitations; and *Dormer v. Fortescue* in *Dom. Proc.* is there given as the authority: so that it seems an actual entry in the case of the statute of limitations is necessary. *5 Ref. Buller N. P. Edit. 1775. 102. quot. Dougl. 468. as an authority.*

By stat. 4 Ann. c. 16. s. 16. it is further enacted, "That no claim or entry shall be sufficient to avoid a fine levied with proclamations, unless the action be commenced within one year after making such entry or claim; and to avoid the statute of limitations, unless the action has been commenced within the same time."

3. And as to what shall be a sufficient entry, it has been decided,

1. That in this case where a fine had been levied, the lessor if the plaintiff proved that he had gone to the house in question, *Anon. Skin. 412.*

## EJECTMENT.

question, and at the gate said to the tenant that he was the owner of the house and land, and forbade him to pay any more rent to the defendant, but that he had not entered the house when he made the demand. On which it was agreed, that the claim at the gate without entering the house was insufficient. Then it was proved that there was a court before the house, and which belonged to it; and that though the claim was at the gate, yet that it was on the land, and not in the street; this was holden to be a good entry, and clearly to support the ejectment.

Fitchet v.  
Adams.  
2 Str. 1128.

2. So where a stranger made an entry on the premises, on behalf of the lessor of the plaintiff, but without any authority from him at that time, claiming for him under a will, but the lessor of the plaintiff assented to it before the day laid in the demur; the court were clearly of opinion that the entry was sufficient to support the ejectment brought on the title, the subsequent assent having established the validity of the first entry.

3. It is enacted by statute 11 Geo. 2. c. 19. "That where an ejectment is served on the tenant, that the landlord may by leave of the court make himself defendant with the tenant in possession, in case he appears; but in case the tenant will not appear, judgment shall be signed against the casual ejector. But upon the landlord's entering into the common rule, as the tenant ought to have done, the court will order a stay of execution upon such judgment till further order."

Under this statute, it has been resolved,

1st. "That the landlord has under the statute a right to be made a defendant, if he applies; but it is optional on him to do so or not."

Underhill v.  
Durham.  
Salk. 256.

For where the plaintiff moved, that the landlord might be joined as a co-defendant with the tenant in possession, the court refused the motion, on the ground that they could not do it without his request.

Ibid.

And in another case, where the landlord moved to be made a defendant, the plaintiff opposed it, on the ground that the landlord was a member of parliament: but per Holt, he must be joined; and we cannot compel him to waive his privilege.

2. "No man can be admitted as a defendant under the statute, unless he is the actual landlord, or one who has been in possession; for this might encourage maintenance."

Therefore

Therefore where a man devised his estate to J. S. and the heir brought his action of ejectment against the tenant, J. S. (the devisee) applied to be admitted a defendant, and was refused, for he was not the actual landlord.

Roe ex dim.  
Leake v. Doe.  
Mich. 29 G. 2.  
C. B.  
Buller N. P. 95.

But the court permitted a *devisee in trust* to defend in ejectment as landlord, under the stat. 11 Geo. 2. though they would not allow *cestui que trust* himself.

Lovetlock ex dim.  
Morris v. Doncaster.  
4 Term Rep. 122.

So a *mortgagee*, who had never been in possession or received the rents, has been refused to be made a defendant.

and 3 Term Rep. 783.  
Jones ex dim.  
Woodward v. Williams.  
Trin. 13 Geo. 2.  
Buller N. P. 95.  
1 Barnes 122.

And in cases of *vacant possession* no person claiming title will be let in to defend; but he that can first seal a lease on the premises must obtain possession.

"And this rule was made to prevent *mere strangers* from being admitted as defendants."

Therefore a *purchaser of a reversion*, which seemed to be a pretended title, and where no rent had ever been paid, was held to be inadmissible as a defendant.

Doe ex dim.  
James v. Roe.  
Hill. 1761.  
quot. 3 Burr. 1291.  
Fairclain ex dim.  
Fowler v. Shamtile.  
3 Burr. 1290.  
1 Black. Rep. 357. S. C.

But in this case, which was a disputed title between the lord by escheat and the heir, neither of whom had been in possession, the court resolved, That the title should be tried, and ordered the ejectment to be brought by the lord by escheat, and that the heir should be admitted to defend either alone, or with the tenant in possession.

4. Though the defendant confesses lease, entry, and ouster, yet he may deny that he is in possession of the premises, for which the plaintiff goes and put the plaintiff upon proving it; and if he cannot, he shall be nonsuited.

Smith ex dim.  
Taylor v. Mann.  
1 Will. 220.  
Buller N. P. 10.

And where the landlord has been admitted as defendant, the plaintiff must prove that the defendant or his tenant are in possession of the premises in question. For the rule is, That the landlord shall defend for the premises only, whereof his tenants are in possession; and the party does not admit himself landlord of any premises which the plaintiff may make title to, but to such only as were in possession of his tenants.

S. C.

But it has been said, that if there be but one defendant, as tenant in possession, that the plaintiff need not prove him in possession; because if he was not, why did he enter into the title?

Doe ex dim.  
Jesse v. Bacchus.  
M. 30 G. 2. at Sittings.  
Buller N. B.

So it is said in this case, that where the husband is lessor of the plaintiff, that the wife may be made a defendant in ejectment. As where the plaintiff's title was by a pretended intermarriage, which was controverted.

110.  
Fenwick's case.  
Salk. 257.

2dly, I shall now consider more particularly certain ~~pleas~~ which are good in this action.

Alden's case.  
5 Co. 105. a.

1st, "That the lands for which the ejectment is brought are *ancient demesne*, is a good plea in abatement."

Barker v  
Wick.  
Salk. 56.

But the plea must state, that the lands are held of such a manor which is ancient demesne, not that *they are parcel of the manor*; for though the manor is ancient demesne, yet the manor and the demesnes of the manor are impleadable in the king's courts and at common law, and not in the lord's courts, for that would be to make the lord judge in his own cause. But lands *held of a manor* which is ancient demesne, are impleadable in the court of ancient demesne, and there only. *F. N. B. 11 m. 1 Roll. 324.*

Brittle v. Dade.  
Salk. 185.

Therefore if the lands are *copyhold* and ancient demesne, the ejectment for them must be tried at common law; for copyhold lands cannot be *held of a manor*, but must be *parcel of it*.

"So the plea should state the *manor to be ancient demesne*."

Dec ex dim.  
Rust v. Roe.  
2 Burr. 1046.

For where in this case the affidavit on which the plea was grounded, only stated "That the lands stated in the declaration were ancient demesne, and held of the manor of *Godmanchester*," without saying that the manor was ancient demesne, it was adjudged to be bad and insufficient: for this plea being to oust the courts above of jurisdiction, it can only be done by shewing another which has, and that is by stating the manor to be ancient demesne. Besides, the estate of the lessor of the plaintiff should appear; for if he has only a *term*, he cannot sue in the courts of *ancient demesne*.

Hatch v.  
Cannon,  
3 Will. 51.

But this being a dilatory plea to the jurisdiction of the court, must always be verified by affidavit.

Moor v.  
Hawkins.  
Yelv. 180.

2. If the plaintiff after issue, and before trial, *enters into part of the lands in dispute*, the defendant may at the assizes plead this as a plea *puis darreign continuance*, in bar of plaintiff's action: but it is at the discretion of the judges if they will admit it; but if they do, it stops the trial, and the plaintiff is not to reply to it at the assizes, but the judge is to return it as parcel of the record of *Nisi Prius*.

Henry Peytoe's  
case.  
9 Co. 77. b.  
Brownl. 128.  
S. C.

3. *Accord and satisfaction* is a good plea in ejectment.

For ejectment supposes a trespass; and they are so interwoven, that they cannot be severed; and in all actions which suppose a wrong *vi et armis*, and where a *capias* and *exigent* lay, accord is a good plea.

4. General estates in fee simple may be generally pleaded, Co. Lit. 303. b. but the commencement of estates tail, and other particular estates, ought to be shewn, unless where alledged only by way of inducement. So the life of tenant in tail or for life ought to be averred.

As where to trespass for spoiling plaintiff's grafs, defendant John's v. justified and derived his title under one *Knight, who was law- Whitley.*  
fully intitled to the remainder of a term for ninety-nine years, 3 Wils. 65.  
without saying any thing more, or how derived out of the Scilly v. Dally.  
fee: the plea on special demurrer was held to be bad. Salk. 562.  
S. P.

So no one can in pleading make title to a copyhold, unless Shepherd's case.  
he shews a grant thereof; it is not sufficient to say "that Cro. Car. 190.  
"such a one was seised in fee, or in tail," &c.

*Note.* If judgment in ejectment be signed in a country Anon.  
cause for want of a plea, but no possession delivered, a judge Salk. 516.  
at his chambers, at any time before the affizes, may compel  
the plaintiff to accept of a plea; but if possession has been  
delivered, he is without remedy.

## 5. OF THE EVIDENCE.

As in this action each party claims a title to the lands, I shall consider together

### THE EVIDENCE FOR THE PLAINTIFF AND DEFENDANT.

1. "In ejectment the plaintiff must recover by the strength  
"of his own title, not by the weakness of his adversary's,  
"for whom possession is a good title. The plaintiff must  
"therefore always shew a good and sufficient title in himself, or  
"he cannot recover."

Therefore where in an ejectment under two several de- Roe ex dim.  
mises, a title was proved in one of the lessors of the plain- Haldane and  
tiff (*Mrs. Haldane*) but a witness for the plaintiff proved Urry v.  
that *she had assigned all her interest in the premises to the other Harvey.*  
by a deed then in court; but the plaintiffs refused to pro- 4 Burr. 2484.  
duce this deed, upon which a nonsuit took place; for by  
this evidence all title was taken away from one of the lessors  
of the plaintiff, and there was no proof of the conveyance to  
the other, and so no proof of any title in him.

"So that it will be sufficient for the defendant in ejectment Bnll N. P.  
"to prove a title out of the lessor of the plaintiff, though he 110.  
"can prove no title in himself.

As

Doe ex adm.  
Crisp v. Bar-  
ber.  
2 Term Rep.  
749.

As where the lessor of the plaintiff claimed under a demise of the rectory-house, &c. from the rector for 21 years, and the defendant had entered on him without any colour of title whatever, the defendant at the trial relied on the lease being void under stat. 13 Eliz. 20. by reason of the non-residence of the rector, he having been absent for more than 80 days within the year, which fact was proved; it was decided, That by the words of the statute, the lease being declared to be void, that the lessor of the plaintiff had no title, and so could not recover, though the defendant had no colour of title, and was a stranger and a wrongdoer.

— ex adm.  
Brookholding  
v. Baldwin.  
Worcester Sum  
Ass. 1759.  
MSS.

So in ejectment for a moiety of an Inn at Bewdley, which was copyhold, the plaintiff relied for his title only on payment of rent, which had been uniformly paid to him for forty years, twenty-eight years by the defendant's husband in her right, and twelve years by the defendant herself; the counsel for the defendant offered to prove that the premises had been entailed by an old surrender to her father for life, with remainder over; and that the father, though only tenant for life, had made a lease for 500 years in trust, as to one moiety for the persons under whom the plaintiff claimed, and as to the other moiety in trust for her; that the rent had been paid by the defendant, supposing the lease was good, which in fact was void since the father's death. It was objected, for the plaintiff, that this evidence was inadmissible, 1st. Because payment of rent was conclusive evidence against the defendant, that she could not set up a title in herself, but should have let the plaintiff into possession, and then have brought her ejectment: 2dly, That she was barred by the statute of limitations. But Baron Adams over-ruled both objections, holding, 1st, That ejectment being an action to try the title, that the defendant was at liberty to set up a title in herself: 2dly, That the holding being as a tenancy in common, that the defendant was never out of possession, and so that the statute did not attach, and relied on *Reading v. Rayson. Salk. 242.*

England ex  
dim.  
Syburn v.  
Slade.  
4 Term Rep.  
682.

So where the lessor of the plaintiff held a lease of the premises for which the ejectment was brought, for twenty-one years, and the defendant was his under-lessee, it was resolved, That in ejectment for these premises the defendant might show that his landlord's term was expired.

“ But if he proves a title out of the lessor of the plaintiff, it must be a good and a subsisting one elsewhere; a supposed title in another will not be sufficient.”

Ball. N. P.  
110.

As if the defendant was to produce an old lease of one thousand years to another of the lands in question; that  
along

deed would not be sufficient, *unless he proved possession under such deed, within twenty years.*

So in ejectment by the second mortgagee against the mortgagor, he shall not give in evidence the title of the first mortgagee in bar of the second, for he is barred to aver against his own act, that he had nothing in land when he made the second mortgage.

Lindley v. Lindley.  
Bull. N. P. 110.

So if the defendant produces an old mortgage-deed, whereon interest has not been paid, nor mortgagee entered; against the title of the lessor of the plaintiff, who claims under the mortgagor, this will not be sufficient to defeat the lessor of the plaintiff, because that no interest appearing to be paid, the court will presume that the mortgage was satisfied: but if the defendant can prove payment of interest upon such mortgage after the time of redemption, and within twenty years, it will be sufficient to nonsuit the plaintiff.

Wilson v. Witherby.  
8 Ann. in King's Bench.  
per Holt.  
Bull. N. P. 110.

So where the defendant produced a mortgage-deed for years of the ancestor of the lessor of the plaintiff, upon which was this indorsement, "Received 30th of March (being after the day limited in the proviso) from Mrs. M. G. 300l. on the within written mortgage; and I do hereby release to the said M. G. and discharge the mortgaged premises of the said term of five hundred years:" the ejectment was brought by the heir at law against the defendant, who had got the mortgage-deeds in his hands, and was in possession. At the trial he produced the above mortgage-deed, and insisted that the mortgage term was still subsisting, and that the possession was sufficient against the plaintiff, who must recover by the strength of his own case. To prove the term subsisting, the defendant relied that the term being created by deed, could only be surrendered by deed, which here was not the case, and that the payment being after the day limited in the proviso of the mortgage-deed, that the legal estate was still in the mortgagee: but on a case reserved, the court were of opinion, 1st, That these words amounted to a surrender: 2dly, That such surrender might be by note in writing, within the statute of frauds, for under the statute, any term of years may be created by writing without deed, and the same be surrendered by deed or note in writing: and, 3dly, That such note in writing was not required to be stamped. The court therefore held, That the defendant shewed no subsisting title against the lessor of the plaintiff under this deed; and the plaintiff therefore recovered.

Farmer ex dem. Earl v. Rogers.  
2 Will. 26.  
Buller N. P.  
110. S. C.

" And though lessor of the plaintiff in ejectment must shew a good and subsisting title in himself, yet in the case of *Lade*, Bart. v. *Holford*, Pasch. 3 Geo. 3. B. R. Ld. Mansfield

Buller N. P.  
112.

Doughl. 665.

211

\* *Quere*, Vid.  
v. *Staple*.  
2 T. Rep. 684.

*See ex dim.*  
*Bristowe v.*  
*Pegge*.  
1 Term Rep.  
758.

*Harris v.*  
*Stroud*.  
*Latch*. 62.

*Snow v Philips*.  
1 Sid. 220.

*Meath v Frynn*.  
1 Vent. 14.  
1 Sid. 426.  
S C.

\* *Mansfield* declared that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be non-suited, by a term standing out in his own trustee, or by setting up of a satisfied term by the mortgagee against the mortgagor; but that he would direct the jury to presume it to have been surrendered.

"So where a legal term is created for a particular purpose, if that purpose is satisfied, or if *unsatisfied, not interfering with the contesting parties*\*, it shall not be set up against the lessor of the plaintiff."

For where an ejectment was brought for a moiety of the manor of *Winkburn*, under the will of *Dr. Burnell* as one of his co-heirs. By the testator's marriage-settlement *A. D.* 1748, two terms had been created, one for ninety-nine years to secure an annuity of 200l. *per ann.* to the testator's mother; the other of 1000 years to raise 2000l. for his wife in case she had no issue. The testator died in 1774, leaving no issue, and by his will devised all his estates to trustees in trust after the death of his wife, for such persons as according to the laws of descent should be his heirs at law. The defendant in 1776 had been found heir at law in consequence of an issue out of *Chancery*, as descended from a daughter of a common ancestor, and was in possession; the lessor of the plaintiff claimed as heir at law, by descent from another sister of the same ancestor, and brought his ejectment for the moiety, and did not mean to disturb the terms above created: the defendant set up those terms against him: but it was adjudged, That as the plaintiff went to recover the lands, *subject to the uses of the subsisting term*, that this term should never be set up by a third person.

2. "Where several matters are necessary to give a complete title, the plaintiff must prove all those requisites."

Therefore where in an ejectment for a rectory, the plaintiff proved the *taking of the tithes* only, but not an entry into the glebe, he was non-suited.

For if an ejectment is brought for a rectory, the plaintiff ought to prove that his lessor was *admitted, instituted, and inducted*, and *had read and subscribed the thirty-nine articles*, and *had declared his assent and consent to all things contained in the book of Common Prayer*. But he need not prove a *title in his patron*; for institution on the presentation of a stranger is sufficient to bar him, who has right in ejectment, and put the rightful patron to his *quare impedit*.

So he must also prove *presentation*; and institution alone is not sufficient evidence of presentation, though it was recited in the letters of presentation, especially if induction and possession has not followed.

But



But, *quære*, if proof of a verbal presentation would not be sufficient? Buller N.P. 105.

“But reasonable presumption is admissible in favour of a title.”

As in an ejectment for an inn at *Lewisham* in *Kent*, the defendant having proved that the first title set up by the lessor of the plaintiff was at an end, he being a lessee under one *George Pym*, another lease was offered in evidence made to the lessor of the plaintiff, by one *John Pym*, who claimed under the will of *George Pym*, who thereby gave the estate in question to trustees, in trust for *John Pym*, and to convey the same to him when he attained the age of twenty-one years: this age he had attained three years before, but there was no conveyance from the trustees to *John Pym* given in evidence: for this, *Just.* Gould nonsuited the plaintiff. On a motion for a new trial, the court set the nonsuit aside, holding that it might be presumed that the trustees had done their duty in making the conveyance when *John Pym* came of age, and that a jury may be directed to presume a conveyance or surrender in much less time than twenty years. England ex dim. Syburn v Slade. 4 Term Rep. 682.

So where in an ejectment for the residue of a term, created the 5th of *Elizabeth*, the plaintiff produced the original lease, and proved possession in himself, and those under whom he claimed, since 6th of *Ann.* and proved one mesne assignment in the 16 *Jac.* 1.; the plaintiff was nonsuited at the trial for want of proving all the assignments, it being supposed to be necessary for him to prove every step of his title, and so the mesne assignments; but the court set the nonsuit aside, holding that mesne assignments should be presumed after so long a possession. Earl ex dim. Goodwin v. Baxter. 2 Blackst. Rep. 1218.

3. “This being an action of trespass, every part of the declaration must be proved.”

For where the plaintiff declared in ejectment for an house in *Peter's-street* and *Ward of Cheap*, and the defendant proved that the house was in the *Ward of Farringdon*, and that no part of *Peter's-street* was in the *Ward of Cheap*, the plaintiff was nonsuited. Body v. Smith. 1 Sira. 595.

“But if the plaintiff declares on a lease of a certain date, though his proof does not establish that lease as declared on, yet if he proves a good and subsisting lease at the time, it shall be sufficient.”

As where the declaration was on a lease made the 14th of *January*, 30 of *Eliz.* and the evidence was a lease sealed the 13th of the same year, the evidence was held to be good, for if it was a lease sealed the 13th, it was a good lease on the 14th. Force v. Foster. 4 Leoa. 14.

4. “Leases

Per Lord  
Mansfield.  
3 Burr. 1609.

4. "*Leases at will* exist now only notionally; and now all leases are deemed to be from year to year, and cannot be determined without reasonable notice, which may be done by either party."

Per De Grey,  
C. J.  
2 Black Rep.  
1173.

All leases for uncertain terms are *prima facie* leases at will, and it is the reservation of an annual rent that turns them into leases from year to year; it is possible that circumstances may make them leases for a longer time, as where the crop (liquorice or madder, for example) does not come to perfection in less than two years; and perhaps the nature of the ground and course of husbandry may deserve to be considered.

Roe ex dem.  
Bree v. Lea.  
2 Black Rep.  
1171.

But though a custom is proved to exist where the lands lie, that *where any part of the lands are open fields*, that that shall give the tenant a right for three years; yet where there is an indeterminate taking, this custom shall not controul it: the rule now laid down for such an indeterminate demise is always a taking from year to year, and the custom is unreasonable, for so by the tenant's having one acre of common field, might he determine the tenure of one hundred acres held in severalty.

Maddon v.  
White.  
2 Term Rep.  
159.

And even where an infant becomes entitled to the reversion of an estate, or demises it himself reserving rent, he cannot recover the possession by ejectment, without giving the regular notice.

Doe ex dem.  
Bromfield v.  
Smith.  
2 Term Rep.  
436.

So where there was an agreement for a lease made by the lessor of the plaintiff for her own life, but a clause in it that *her son* (who was then an infant) *should have a power to take the house himself when he came of age*, it was adjudged, That under this agreement, the son, on his attaining the age of twenty-one, *should signify his intention in a reasonable time*, and that where he did not do so for a year, and then gave notice to the tenant to quit, that the tenant could not on such notice be evicted.

## 2. As to the time of the notice, it is settled that

Parker ex dem.  
Walker v.  
Constable.  
3 Will. 25.

Wherever therefore the landlord brings ejectment for lands so demised at will, he must prove "*That half a year's previous notice was given to the tenant to quit*, or to his executor, in case of his death," or the plaintiff shall be nonsuited at the trial.

Goodtitle v.  
Mullewhite.  
Exon Sum Ass.  
1783. MSS.

But where the notice was given on the 30th of September, being the day after Michaelmas-day, to quit at Lady-day following, Justice Heath ruled the notice sufficient.

" And

" And so the course of husbandry, and the custom of the country, has admitted some relaxation, as to the precise time required."

As where the ejectment was for lands on the following case. *Doe ex dim.*  
On the 5th of *October*, 1769, by written memorandum, the plaintiff agreed to let to the defendant a farm at *Newsbam*, to hold the arable land from the 13th of *February* following; the pasture from the 5th of *April*, and the meadow-ground from the 12th of *May*, for seven years at 26l. *per annum* rent, payable at *Michaelmas* and *Lady-day*, the defendant to have a waygoing crop; the defendant continued tenant till the end of the term. On the 30th of *September*, 1777, the plaintiff gave a written notice to quit the arable land on the 13th of *February*, the pasture on the 5th of *April*, and the meadow on the 12th of *May* following; and the question was, if this was a sufficient notice? it being insisted on for the defendant, that the notice should have been given the 13th of *August*, which would have been six complete months before the first day of quitting. But *Per Cur.* the six months notice to quit is required by law, *except where any special agreement*; or the custom of particular places intervenes, the true construction of this agreement is an holding from *Lady-day* to *Lady-day*, the rent is so reserved; and though part of the farm is to be entered on, and quitted the 13th of *February*, it is no more than the custom of most countries would have directed without any special words, on a taking from *Lady-day* to *Lady-day*, that being the time when the land is to be prepared for lent-corn; and as the tenant outgoing has the benefit of the waygoing crop, any inconvenience to him is obviated, whereas great mischief might happen to landlords, if compelled to give a notice so early as *August*, as it would enable the tenant to harass the land.

*Dagget v. Snowden.*  
2 Black. Rep. 1124.

" And the lessor cannot determine his will at any time, but must determine it at the end of the year."

For the six months notice to quit must be given at the end and expiration of the first six months, so that the notice must be to quit at the end of the year.

*Right ex dim.*  
*Flower v. Darby.*  
1 Term Rep. 139.

" It has been ruled at *Nisi Prius*, That where notice to quit has been served on the tenant, and the landlord being ignorant of the time when the tenancy commenced, has given the notice to quit at the wrong time; that is, not at the end of the year, that the tenant when the notice is served ought to inform the landlord of his error, and inform him of the true time."

But

Oakapple v.  
Copou.  
4 Term Rep.  
361.

But in this case, where the defendant held from *Michaelmas*, and the notice to quit was at *Midsummer*, on receiving the notice, he made no objection as to the time, but said "I pay rent enough already, and it is hard to use me thus:" the judge refused to nonsuit the plaintiff at the trial, holding that the defendant had waived the objection as to the time of the notice, by not objecting to it at the time, and the plaintiff had a verdict; but it was set aside, the court being of opinion, That the objection was not waived, but that the defendant might avail himself of it at the trial.

3. "As to the *form* of the notice, it must be positive, and "not leave an option in the tenant to quit, or to hold over "on certain terms."

Doe ex dim.  
Matthews v.  
Jackson.  
Douglas 167.

The notice served on the tenant was in writing, and in the following words: "I desire you to quit possession on *Lady-day* next, or *I shall insist upon double rent*:" it was insisted that this was not a good notice, as not being positive, but leaving an option in the tenant to pay the double rent; but the court held it to be sufficiently positive, and that the latter words only were added by way of threat of the consequence of holding over the possession; but that had the words been "*or else that you agree to pay double rent*," there the tenant would have had an option, and the notice not have been sufficient.

Jones ex dim.  
Griffiths v.  
Marth.  
4 Term Rep.  
464.

4. As to the *service of the notice*, it was decided, That where the service of the notice to quit was *on a maid-servant in the defendant's house*, to whom it was delivered, and the contents of it explained, but there was no evidence of its having come to the defendant's hands, and the house was not on the demised premises, the court held this a good and sufficient service; for the servant who was in the power of the defendant, might have been called to prove that she had not delivered it to her master; but not being so, it was presumptive proof that he had received it.

Throgmorton  
v. Whelpdale.  
Hill. 9 G. 3.  
B. R.  
Buller N. P. 96.

5. In what *case notice is unnecessary*. 1. This is the case where the tenant has attorned to some other person, or done some other act, *disclaiming to hold as tenant to the landlord*: in such case no notice is necessary.

Goodright ex  
dim Morgan v.  
Shirley.  
Gloucester Lent  
Ass. 1765. MSS.

As where the ejectment was for the long-room in *Bristol*, the lessor of the plaintiff claimed under a lease from a Mr. *Vernon*, granted in 1762: the defendants had been in possession three or four years before the granting of this lease, and continued to the bringing of the ejectment: the defendants insisted that they had never attorned or acknowledged *Morgan* (the lessor of the plaintiff) as lessor; and if they had, that they

they ought to have had a notice to quit: but *Wilmot, Just.* As the defendants have never allowed the right of *Morgan*; but disclaim the tenancy under him, notice cannot be necessary, and therefore having proved the right of *Vernon*, under whom *Morgan* claims a title to the premises, he has a right to recover without notice.

2. So in the case of leases made by mortgagors (*ante*); and in general, it seems that wherever the lessee holds under a void demise, that no notice is necessary. *Vid. Post. 464. Goodtitle v. Prentice.*

6. "It often happens that after a notice to quit has been regularly served on the tenant, that the landlord does some act which amounts to a waiver of this notice."

As to which it has been settled,

"That the mere acceptance of rent, unaccompanied by other circumstances, shall not be a waiver of the notice to quit."

For where the lessor of the plaintiff served a regular notice on the defendant to quit at *Michaelmas*, and the defendant not quitting accordingly, he brought his ejectment, and laid the demise to the plaintiff on the 30th of *September*; the lessor afterwards, before the trial, which was in *Hillary* term following, accepted the rent due from *Michaelmas* to *Christmas*; this, it was insisted, being subsequent to the time when the defendant had notice to quit, was a waiver of the notice; but the court were of opinion that it did not of itself amount to a waiver, but was proper evidence to be left to the jury, *quo animo* it was done: as it might be a waiver only of the double rent, to which lessor was entitled; or he might have taken it under the terms that it should not be a waiver of the notice. Doe ex dim.  
Cheney v. Bat-  
ten.  
Cowp. 243.

But where the ejectment was by a landlord against his tenant on a proviso for a re-entry for a forfeiture, it was held by the whole court, that the lessor's bringing an action of covenant for half a year's rent subsequent to the time of the demise laid in the declaration in ejectment, was a waiver of the right of entry for the forfeiture, and an acknowledgment that the covenant then subsisted: for had the lease been at an end, it could not support an action of covenant; and courts at law always lean against forfeitures. Roe ex dim.  
Crompton v.  
Minshall.  
Pasc. 33 Geo. 3.  
B. R.  
Buller N.P. 96.

And on the same ground, where the ejectment has been to recover lands demised, grounded on statute 4 Geo. 2. c. 28. for non-payment of rent, and no sufficient distress, acceptance of rent after the time of the demise laid, has been held Per Aldon, Just.  
Cowp. 247.

held to be a waiver of the right of recovery; for it is a penalty; and by accepting the rent the party waives the penalty.

5. "Where *leases for life or years* are void or voidable, possession is recovered of the lands demised by this action; but it often occurs in evidence, that the lessor may have barred his right of entry, and of recovery of the lands by some act, affirming that which he might have avoided."

I shall therefore consider *the cases that have occurred on this head.*

Co. Litt. 215. b. 1st. "Where a lease is absolutely void, nothing implied shall amount to a confirmation of it, or a waiver of the right of recovering the possession from the tenant, who derives his title under it."

Doe ex dim.  
Simpson v.  
Butcher.  
Doug1. 50.

As where tenant for life made a greater lease than he could lawfully make, which of course was void; though he in remainder *accepted the rent*, after the death of the tenant for life, it was held not to confirm the lease, which was void *ab initio*.

Goodright ex  
dim. Wynne v.  
Humphrys.  
Doug1. 52.  
In notis.

So where *Jane Lady Buckley*, being tenant for life, with remainders over in tail to her sons and daughters successively with power to make leases for twenty-one years in remainder, but not in reversion, intermarried with *Edward Williams*, who without her concurrence, made a lease to the defendant for ninety-nine years, determinable on three lives, which was not within the power: *Edward Williams* died, having received the rent during his life: after his death *Lady Buckley* received the rents, and granted receipts: she died, by which *Jane*, her eldest daughter, became tenant in tail, and suffered a recovery having received the rent till her marriage with the lessor of the plaintiff, who also received the rents for some time after the marriage, and the counterpart of the lease was found in his possession; and notwithstanding those several acceptances of rent the lease was adjudged to be void: for being void at its creation, nothing subsequent could establish it.

Jenkins ex dim.  
Yate v. Church.  
Cowp. 482.  
S. P.

"Therefore where the lessee has entered under a lease for life or years, which turns out afterwards to be void, though his entry has been lawful, he shall not be deemed a tenant at will, nor be proceeded against as such in ejectment."

Goodtitle ex  
dim Adeane v.  
Prentice.  
Coram Gould,  
Just. Surry  
1. cent Aff. 1790.  
MSS.

For where in ejectment for lands in *Surry*, the case was *Elizabeth Compton* being intitled to a copyhold of inheritance held of the manor of *Kennington*, was admitted to

A. B.

*A. D. 1767*: in 1780 Mr. *Compton* her husband granted a lease to *Mitchell* for forty years (under whom the defendant claimed) without the consent or the joining of his wife, and so contrary to stat. 32 *Hen. 8. c. 38.*: in 1782 Mrs. *Compton* died, leaving her husband and an only daughter (now the lessor of the plaintiff) her heir at law; Mr. *Compton* received the rent till the time of his death in 1788, and Mrs. *Adeane*, the lessor of the plaintiff, also received it after his death as reserved by the lease till 1789; when, on discovering that the lease was void under stat. 32 *Hen. 8.* and also not warranted by the custom of the manor, the present ejectment was brought *without giving notice to quit*. For the defendant, it was insisted that the lease was good, or at most only voidable, and confirmed by acceptance of rent by Mrs. *Adeane* the plaintiff; but if she had not confirmed the lease, that she had made it a *tenancy from year to year, and so should have given notice to quit*; but both points were over-ruled by the judge, and the plaintiff recovered.

2. "Where the lease is *voidable*, there some act is required Co. Litt. 211. .  
"by the party who has a right, to shew that he has taken  
"advantage of his right: and as to what shall be deemed  
"such act, and what a waiver of his right, it has been decided,"

1. "That the acceptance of rent, after notice of forfeiture incurred, is a waiver of it."

The lease in question was with a condition that if the lessee should grant, alien, or assign the premises without the assent of the lessor, that then the lessor might re-enter: the lessee assigned part, and the lessor *accepted rent after the assignment*, but it did not appear that he had notice of the assignment at the time: upon this it was resolved, 1st, That notice of the assignment was material and traversable, for the assignment might be made so near the day of payment of the rent, and so secretly, that lessor could not have knowledge of it, and so lessee would have advantage of his own fraud: 2dly, *But where the lessor has notice*, as if the right of re-entry be for non-payment of rent, which he must know, there the acceptance of rent before an entry waives the right of entry; so if he distrains for it, it waives the right of entry, for by distraining, he affirms the rent to have continuance.

*Pennant's case*  
3 Co. 64.

"And it is so in all cases where lessor accepts rent after notice of a condition broken, which is to give him a right of entry: it shall be deemed a waiver of the forfeiture."

Goodright ex  
dim. Walter v.  
Davids.  
Cowp. 803.

For where in a lease to the defendant from the lessor of the plaintiff, the defendant covenanted "*not to assign or under-let without licence from the lessor, under hand and seal first had and obtained:*" the defendant did under-let several parts of the land; but it being proved that such *under-letting was well known to the lessor of the plaintiff, and that he had accepted rent afterwards*, it was adjudged to be clearly a waiver of his right of entry; and the defendant had judgment.

Per Lord  
Mansfield.  
Cowp. 483.

So that in general where the lease is merely voidable, the acceptance of rent alone, *unaccompanied with other circumstances*, is not a confirmation: to make it so, it must be done *with a knowledge of the title at the time*; or where *the remainder man lies by, and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant*.

2. "But a difference is to be observed on the operations of the same words, when applied to leases for *life* or for *years*."

Pennant's case.  
3 Co. 64. a.

If a condition is annexed to a *lease for years*, and that in case of a breach that then the *lease shall be void*, in such case, no acceptance of rent after a breach of the condition shall make the lease good, for it is void: but in the case of a *lease for life*, with a like condition, and *to be void on the breach* of it, acceptance of rent after the condition broken shall waive the forfeiture; for an estate of freehold cannot be avoided without an entry.

"But how far this must be an actual entry on the lands, seems not to be settled."

Little v. Heaton.  
Salk. 259.

In this case it is decided, That where an ejectment is brought by the lessor against the lessee, on a condition of re-entry for non-payment of rent, proof of an actual entry and ouster is not necessary: but *Salkeld* makes a quære, if an actual entry is not necessary where it is requisite to complete the title of the lessor of the plaintiff? for, by the rule, the entry of the *nominal plaintiff only* is confessed; it confesses the lease, but does not admit the lessor of the plaintiff's right to make it.

6. In this action titles to lands arising under wills are tried.

These for the most part are cases brought by the heir at law against the devisee, or against the person who claims to be heir at law, on the ground of bastardy; or by a devisee claiming an estate under a will.



But it is previously to be observed, that where a person brings an ejectment as heir at law, he must make out a regular pedigree from the ancestor under whom he claims; mere report of relationship, or supposition, are not sufficient; for if such evidence should be admitted, the estate might be carried contrary to the rules of descent; as to the paternal instead of the maternal line for example.

Rec ex dim.  
Thorne v. Loyd.  
2 Black Rep.  
1099.

In ejectments against devisees, or their heirs, the matter turns on the due execution of the will; on the testator's capacity to devise, or on the legality of the devise itself.

# I. AS TO THE DUE EXECUTION OF THE WILL.

It is enacted by the statute of frauds, 29 Car. 2. c. 3. "That all devisees of lands or tenements, deviseable either by common law or statute, shall be in writing, and signed by the party devising the same, or by some other person in his presence, and by his express directions, and shall be attested by three or four credible witnesses, and subscribed by them in the presence of the devisor, otherwise such will shall be void, and of none effect."

Under this statute it is to be considered, 1st, To what estates it extends: 2. What shall be a sufficient signing by the testator, and by the witnesses: 3. Who are credible and sufficient witnesses within the statute: 4. Of the effect and proof by them of the execution. And,

## 1st, To what Estates it extends.

1. The clause in the statute only extends to such estates as pass by the statute of wills, 34 & 35 H. 8. c. 5.; that is, only to *estates of inheritance*: therefore where the testator devised his copyhold estate by will, but the will was not attested by any witnesses, it was held to be sufficient to pass that estate, for that the statute of frauds did not extend to it.

Tuffnell v Page.  
2. Atk. 37.  
Attorney Gen.  
v Barnes.  
2 Vern. 598.  
S. P.  
Roe ex dim.  
Gillman v.  
Heyhoe.

2. So this statute does not extend to devises of *terms of years*, for they would go to executors; and the statute never meant to take any thing out of their hands: and in this case where the mortgagee under a long term of years, and also entitled to a long term of years to attend the inheritance in the same lands, purchased the inheritance, and devised it from his heir at law, but the will was not duly attested; his having a term in the same lands, which did not require such attestation, was held not to take the will out of the statute, but that it was void under it.

2 Black. R. p.  
1114. S. P.  
Whitchurch v.  
Whitchurch.  
1 Stra. 620.

## 3. Where

Wagstaffe v.

Wagstaffe.

2 P. Wms. 258.

1 P. Wms. 741.

Coppin v.

Coppin.

2 P. Wms. 291.

3. Where a power is given to appoint the uses and trusts of lands given to trustees, a will appointing those uses and trusts must be executed with the same solemnities of three witnesses, &c. under the statute of frauds, as if the lands themselves were devised; for if allowed to be devised in a different manner from land, the statute would be nugatory; and though the power of appointing is by other writing of the nature of a will, it is the same.

4. So though the will is executed in a foreign country, yet if it is to operate to devise lands in England, it must be executed by three witnesses.

## 2. What shall be a sufficient Signing by the Testator, and what by the Witnesses.

Stonehouse v.

Evelyn

3 P. Wms. 252.

Smith v. Codron.

2 Vez. 455.

5. P.

Per Lord

Mansfield.

3 Burr. 1775.

Peate v. Ogley.

Com. 197.

1. It is not necessary that the witnesses should see the testator sign; it is sufficient if the testator owns to the witnesses that it is his name which is subscribed to the will, and that they subscribe their names in his presence.

2. "It is not necessary that the witnesses should attest in the presence of each other; or that the testator should declare the instrument executed to be his will; or that the witnesses should attest every page, or sheet, or folio of it; or that they should know the contents of it; or that each sheet, folio, or page, should be particularly shewn to them."

Bond v. Seawell

&amp; ux.

3 Burr. 1773.

And therefore where Sir Thomas Chitty made his will, consisting of two sheets of paper, all in his own hand-writing, and signed his name to each, and also made a codicil on a single sheet, which he signed; he then called in a person, shewed him the will in two sheets and the codicil, and said it was his will, and signed by him, and desired him to attest them, which he did: two other persons were then called in; to them he shewed the last sheet of his will and the codicil, which he sealed before them, and they attested them; but these witnesses never saw the first sheet of the will, it was not produced to them; nor did any paper then lie on the table: but after the testator's death both the sheets were found in the testator's bureau, wrapped up together with the codicil: the court were of opinion, That if the first sheet was in the room when the two last witnesses signed, that the will was well executed, and that it was proper matter to be left to a jury, whether in fact it was so or not, though there seemed circumstances sufficient in the case to ground a presumption that the will was in the room at the time.

Carleton ex dim.

Griffin v.

Griffin.

1 Burr. 549.

So where the testator wrote a will, in which he devised a freehold estate, and signed it, but no witness then attested it:

two

two years after, he added a codicil *on the same sheet of paper*, disposing of some personal property; and this was subscribed by three witnesses: it was determined that this signing had reference to the first devise, and that the whole was to be considered as one will attested properly, though made at different times.

3. "It is not necessary that the three witnesses should be all present together at the time that the testator executes his will."

For where it was found by a special verdict in ejectment, that the testator signed and executed his will in *December 1735*, in the presence of *two* witnesses, who attested the same in his presence, and that afterwards in the year 1739, that he went over his name with a pen in the presence of another witness, who attested it at the testator's request: *Lee, C. J.* and the court were of opinion, That the will was well executed, and that it was not required by the statute of frauds that the witnesses should all be present at the same time. *Jones v. Lake. 1742. in B. R. In not. 2 Atk. 176.*

4. "But where the attestation is by witnesses at different times, the testator must do some act of execution, or acknowledge the signature of his name in the presence of each."

For where the testatrix executed her will, in the presence of two witnesses, and afterwards in the presence of a third, said, "This is my will," and desired he would attest it; but did not say that the name subscribed was her hand-writing, or put her seal on it; Lord *Hardwicke* was inclined to think that this was not a sufficient execution of the will by the testatrix under the statute. *Gryle v Gryle. 2 Atk. 176.*

5. "So where the witnesses attest the will separately, it must be the same will or instrument which they attest; for their attestation to different papers shall not be put together, so as to make a good attestation."

For where the testator made his will in writing, subscribed by two witnesses, and devised all his lands to *W. R.* and afterwards made a codicil, in which the will was recited; and this was also attested by two witnesses, one of which had been a witness to the will, but the other was a new one: the question was, if this was a sufficient attestation of the will by three witnesses under the statute? and the court held that it was not. *Lea v. Libb. Carth. 35. Show. 69, 88. S. C.*

So where the testator had made his will, but not witnessed, and afterwards made a codicil, which he expressed to be a codicil *Attorney Gen. v Barnes. Gilb. Eq. Rep. 5.*

*codicil to his last will*, this was executed by three witnesses; it was held not to be a sufficient attestation of the will, it not appearing to have been produced when the codicil was signed.

Smith v. Evans.  
1 Will. 313.

6. It was formerly an opinion, that *sealing* a will by a testator was a sufficient signing within the statute (*Warnford v. Warnford*, 2 *Str.* 764.); but that doctrine has since been over-ruled, and the courts have held that sealing without signing is not a sufficient execution of a will.

Lemayne v.  
Stanley.  
3 Lev. 1.  
3 Mod. 219.  
Salk. 608.

But where the testator's will was written in his own hand, and began "I *John Stanley*," &c. but his name was not subscribed to it, but the will was sealed; it was adjudged to be a good signing within the statute, which did not direct whether the signing was to be at the top or bottom of the will.

7. As to the attestation in the testator's presence.

1. "The statute required the will to be attested in the testator's presence, to prevent the obtruding another will in the place of the true one: it therefore is sufficient if the testator *might see* the witnesses sign it, it is not necessary that he should actually see them sign it; for then if a man should turn his back or look off, it would vitiate the will.

Shires v.  
Glascock.  
Salk. 688.

It therefore was in this case held to be a good execution and signing by the witnesses within the statute, where the testator desired the witnesses to go into another room, seven yards distant, to attest the will, in which there was a window broken, through which the testator might see them: so where the witnesses signed in the room with the testator, he being sick in bed, and the curtains drawn, yet was the execution good.

Casson v. Dade.  
1 Brown's Rep.  
99.

And in a more modern case this doctrine was recognized: where the testatrix having given instructions to her attorney to prepare her will, came to his office to execute it; but being asthmatic, and unable to bear the heat of the office, she went into her carriage, the witnesses attending her to it, and saw her sign it, and then they returned into the office to attest it: the question was, whether this was a proper attestation in the testatrix's presence: but it being proved that the carriage was put back to the office-window, through which it was sworn by a person in the carriage, that the testatrix might have seen the witnesses sign, Lord Chancellor *Thurlow* was of opinion, That the will was well executed.

"These

"These cases go on the presumption that as the testator *might have seen the attestation*, that the court will not presume that he did not; but where that presumption cannot be admitted, there the attestation shall be deemed defective, and the will not properly executed."

For where in ejectment by the heir at law against the devisee, the plaintiff to destroy the will under which the defendant claimed, produced a subsequent will, attested by three witnesses, they proved the signing by the testator in their presence, but that they had not signed in the room with him, but in the hall, which was distant from the room where he was, and where he could not possibly see them sign; this was held to be not a sufficient attestation within the statute, and the will void, so that it could not revoke the first will.

*Eccleston v. Petty.*  
Comb. 156.  
Carth. 79.  
S. C. called  
*Edlestone v. Speake.*  
1 Show. 86.  
*Broderick v. Broderick.*  
1 P. Wms. 239.  
S. P.

2. And the bare subscribing of a will by the witnesses *in the same room with the testator*, does not necessarily imply it to be in the testator's presence: for it might be done clandestinely and fraudulently in a corner of the room, without his knowing what was doing; there should be some circumstances to shew that the testator knew what was doing: as in this case *making a request* to the witness to sign the will was held to be sufficient.

*Longford v. Eyre.*  
2 P. Wms. 740.  
2 Ref.

"For it is essentially necessary to the good attestation of a will, that it is executed with the testator's knowledge."

For where a will was drawn by the directions of the testator, and read over to him in the presence of the three witnesses, who afterwards subscribed it: he signed the two first sheets, and attempted to sign the third; but being unable from weakness, he said, "*I cannot do it, but it is my will.*" when the witnesses returned again, *the testator was in a state of insensibility*, nevertheless the witnesses then subscribed their names, and he died in two days after: this was held not to be a sufficient attestation within the statute; for it could not be said to be executed in the presence of the testator, who was at that time void of perception and understanding.

Right ex dim.  
*Cater v. Price.*  
Doug. 229.

3. And it is not necessary that the attestation should set out "that the signing was in testator's presence;" for where all the witnesses were dead, proof of their hands alone was held to be sufficient, though these words were wanting.

*Croft v. Pawlett.*  
1 Str. 1109.

## 3. Who are sufficient Witnesses within the Statute.

The witnesses must be *credible ones*.

Witnesses

Witnesses which are not credible ones within the statute, are such as are so, 1st, From being interested: 2dly, From crimes.

1. "Where a person is to derive any benefit from the will, whereby he becomes interested in establishing it, he is an incompetent witness under the statute."

Holdfast ex dim.  
Ansty v. Dowling.  
1 Sca. 1253.

As where the testator having devised his estate to the defendant and his heirs in tail, charged it with an annuity of 20l. *per ann.* to the wife of one *John Hailes*: the will was attested by three witnesses, one of whom was this *John Hailes*: it was adjudged, on ejectment brought for the lands devised, by the heir at law, That the benefit which *Hailes's* wife was to derive under the will, was to be considered as a benefit to himself, and to render him an incompetent witness under the statute.

"For though one only of the witnesses is interested, and the other two might prove the will, yet that will not satisfy the statute, which requires that *each* should be free from interest."

Helier v. Jennings.  
1 Lord Raym.  
505.

Which was the case here, one of the witnesses to the will being the devisee of the lands contained in the will, which was therefore held to be void.

"But as it often happened that a will being attested by such persons as are usually attending on a person when on his death-bed, as his apothecary, servants, &c. and who had demands against the estate, as for medicines, wages, &c. and so being creditors to the estate, were incompetent witnesses under these decisions, though the will was otherwise fair and well executed," it was therefore enacted, by statute 25 Geo. 2. c. 6. "That any person who should attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift or appointment should be thereby given (other than and except charges on lands, tenements, and hereditaments for payment of debts) such devise, legacy, &c. should as to such person be utterly null and void, and such person be a good witness to the will."

2. "But in case any lands, tenements, or hereditaments, should be charged with the payment of debts, any creditor whose debt was so charged, might nevertheless be a good and competent witness to the execution of the will or codicil by which the charge has been made."

Wyndham v. Chetwynd  
1 Burr. 414.

And accordingly the court of *King's Bench* in this case, where the witnesses to the testator's will were two of them his attornies, and to whom he was indebted for business done; and

and the third his apothecary, to whom he was also indebted, held them to be good and sufficient witnesses to establish the will; though this case was decided on grounds independent of the statute, yet it seems to fall within it.

But though interest incapacitates a witness, yet may a *legatee* be a witness *against* the will, for there he swears against his own interest. Oxendon v. Penrice. Salk. 691.

2. A second incapacity to a witness is *for crimes*: "in which case a witness so disqualified shall not be a sufficient witness within the statute.

For where there were three witnesses, who regularly had attested the will, but one of them was a person who had been before the attestation, *convicted of petty larceny*, and whipped, the court held him to be an *incompetent witness*, as being *infamous* both by the crime and punishment; and the will was set aside for the want of *three* credible witnesses. Pendock ex dim. Mackender v. Mackender. 2 Will. 18.

#### 4. Of the Proof of the Execution by the Witnesses.

1. "The *execution* of the will may be proved by one witness, though it said that this is so only where no objection is made by the heir, as he has a right to have all called." Bull. N. P. 264.

For one witness may not only prove the executing of the will by the testator, and his own subscribing it in the presence of the testator, but likewise *that the other witness subscribed it* in the presence of the testator; which is a complete execution of the will. Longford v. Eyre. 1 P. Wms. 740. 2 Ref.

And though in this case one of the witnesses to the will would not swear that he saw the testator seal and publish the will, *C. J. Holt* was of opinion, That the will might be well proved notwithstanding, by proving such witness's hand, and that he set it to the will as a witness, for otherwise it would be in the power of a third person to defeat the will which he had attested. Dayrell v. Glaffcock. Skinner 413.

"So if the witness swears *against* his own attestation, as that the testator *did not* regularly execute his will, yet this shall not be sufficient to invalidate it; for contrary testimony shall be admitted, on which the jury shall decide."

For where in an issue out of *Chancery*, *deviseavit vel non*, for lands in *Worcestershire*, the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil, Lowe v. Jolliffe. 1 Black. Rep. 365.

codicil, made four years after the will, all swore that the testator at the time of making his will and codicil was utterly incapable of transacting any business; and a dozen servants of the testator swore to the same effect: to encounter this evidence, the counsel for the devisee examined several of the nobility and principal gentry of *Worcester*, who frequently and familiarly conversed with Mr. *Jolliffe*, the testator, during the whole period, and some on the day whereon the will was made; and also two eminent physicians, who occasionally attended him, and also the attorney who drew the will; all of whom strongly deposed to the entire sanity, and more than common intellectual vigour of the testator: on this evidence, though in direct contradiction to the testimony of the subscribing witnesses, the jury found a verdict in favour of the will.

Hudson's case.  
kin. 79.

So where on a trial at bar on a devise, it was sworn by two of the witnesses, that the testator had not published the will, for that another person had guided his hand, and the testator made his mark, but said nothing, nor was capable of saying any thing: in contradiction to this evidence it was proved, that the testator had made two former wills to the same effect as the present will, and that he died of a consumption, and continued sensible and conversed to his death: on this evidence a verdict was found to establish the will, it not being probable that a person who was sensible after the making of his will, would suffer his hand to be guided to sign that which he disapproved, and yet say nothing.

Goodtitle ex  
dim. Alexander  
v. Clayton.  
4 Burr. 2224.

But it seems now that a witness should not be allowed to attest against his own signing; for where he was admitted, and a verdict found against the will, seemingly on the ground of the evidence given against the will by the witness to it, the court granted a new trial.

Having considered the *execution* of the will by the testator and witnesses, it is necessary to take notice of certain other essentials to a valid will: that is, first, The capacity of the testator to make the will; and, secondly, The legality of the devise of itself; as a defect in either of these requisites renders the will null and void.

## 2. OF THE CAPACITY OF THE TESTATOR TO MAKE A WILL.

Before the statute 32 H. 8. c. 1. lands in fee simple were not deviseable by will; and by that statute a power of devise was given to *all persons* who were seised in fee, &c.

But



But notwithstanding those general words, the courts did *Dyer* 546. b. not construe it to give a power of devising to persons who could not make a good and legal conveyance in any other shape, and therefore held, That *femes covert*, *persons insane*, *infants*, or *persons under duress*, or *undue influence*, could not by will devise their lands.

As to infants, persons insane, and *femes covert*, their incapacity was afterwards declared by stat. 34 H. 8. c. 5. and as to persons under undue influence, or deceived to make a will by practice or fraud, that remains on the common law-footing.

### 1. As to Wills made by Infants.

1. If a person under the age of twenty-one years makes his will, and dies after he has attained that age, the will is void: But if he publishes it after he has attained his age of twenty-one years, such publication shall make the will valid and good. *Herbert v. Torball*. 1 Sid. 162.

But where a man under age made his will, and after full age he declared in the presence of several witnesses that the will should stand good; it was nevertheless held void; by reason that when first published, the testator was an infant; and this was no publication. *Hawes v. Burton*. Comb. 84.

2. The day of the birth is exclusive; that is, if a person is born the first of February, at eleven at night, and the last day of January in the twenty-first year of his age, at one o'clock in the morning, makes his will and dies, that it is a good will to pass his lands, for he was then of full age. *Anon.* Salk. 44.

3. But by custom, an infant under twenty-one years may have a power of devising. *Perk.* 221.

But it is to be observed, that this incapacity to devise under the age of twenty-one years, extends only to cases of *estates in fee simple*; for *terms of years*, and *chattel-interests* may be devised by males at the age of fourteen years, and females of the age of twelve. *Godolph. Orph. Leg. p. 1. ch. 8.* 2 Vern. 104. 469.

### 2. As to Wills made by Persons of non-sane Memory.

These are either *Idiots* or *Lunatics*.

*Idiots* have no power of making a will, or disposing of their property; for by stat. 17 Edw. 2. c. 9. "The king shall

"shall have the profits of the lands of idiots, finding them  
 "necessaries, and after their deaths shall render the estate  
 "to the heirs of such idiots, in order to prevent such idiots  
 "from aliening their lands, and their heirs from being dis-  
 "herited."

Co. Litt. 42.

Persons deaf, dumb, and blind, come under this predicament of idiocy, as wanting those senses by which the mind is furnished with ideas.

Marquis of  
 Winchester's  
 case.  
 6 Co. 23.

*Lunatics* are also incapable of making a will; for any un-  
 soundness of mind disqualifies the person from making a will:  
 and it is not sufficient that the testator be of such understand-  
 ing or memory when he makes his will, as to be able to  
 answer common or familiar questions, but he should have a  
 disposing memory; that is, such as would enable him to dis-  
 pose of his lands with understanding and reason.

### 3. As to Wills by Females Covert.

1 Burr. 431.

"A *feme* during coverture cannot make a will, nor the  
 "spiritual court grant probate of any such instrument: but  
 "in her marriage-settlement she may reserve a power of  
 "making a will, which shall operate as an appointment,  
 "and probate be granted of it."

Stone v.  
 Forfyth.  
 Douglas 681.

And if the devise is of a chattel-interest, under a power  
 reserved to the wife, the will cannot be given in evidence  
 till probate has been granted by the ecclesiastical court.

4. "Fraud, circumvention, or any improper practice, shall  
 "also avoid a will."

Bransby v.  
 Kerridge.  
 Buller N. P.  
 266.

For though the devisee prove the will duly executed ac-  
 cording to the statute, yet if the heir at law can prove any  
 fraud in obtaining it, the jury should find against the will.

Webb v. Cla-  
 verden.  
 2 Atk. 424.

And it must be tried at law, for a court of equity will not  
 interfere.

Per Buller, Just.  
 Goodright ex  
 dem. Farr v.  
 Atkyns.  
 Winton Sum.  
 Aff. 1789.

And where the ejectment is by the heir at law, to set aside  
 the will as obtained by fraud and imposition practised on the  
 testator, the defendant shall not be permitted to call witnesses  
 to his general good character.

### 3. OF THE LEGALITY OF THE DEVISE ITSELF.

Litt. f 287.  
 Co. Litt. 185.

1st. "If lands are held in *joint-tenancy*, one joint-tenant  
 "cannot by will devise or dispose of his moiety, but the  
 "survivor shall have the whole by survivorship; for by the  
 "death

"death of one joint-tenant the title of the other accrues, but  
"the title of the devisee not till after the death of the devisor."

And where a joint-tenant during the existence of that estate made his will, and afterwards severed the joint estate, and made partition, it was adjudged, That the will being void at its creation, did not derive any validity by the subsequent partition, but that the surviving joint-tenant was entitled to the moiety which testator intended should have passed by his will.

Swift ex dim.  
Neale v. Roberts  
3 Burr. 1488.

2. "All devises of lands in *mortmain* are declared to be  
"void by several statutes: as *Magna Charta*, stat. 7 Ed. 1.  
"ft. *West*. 2. Ch. 13. and others."

But under stat. 43 Eliz. c. 4. devises of lands to different corporations have been held to be good by the courts; as *appointments to charitable uses*.

And a restriction is now put on these by stat. 9 G. 2. c. 36. which enacts "That no manors, lands, advowsons, &c. or money in the funds, or to be laid out in lands, shall be given to any bodies politic for charitable uses, unless such gift be made by deed indented in the presence of two credible witnesses twelve months before the death of the donor, and enrolled in chancery within six months after execution, or the stock be transferred within six months before the death of the donor, and be to take effect from the making, and be without power of revocation."

In ejectment for an house and ground belonging to it, by Doe ex dim. he heir at law against the devisee, the case was on the following devise of *Wm. Philips* "to *Adam Aldridge* (the defendant) now preacher of the meeting-house at *Lyndhurst*, I my (describing the premises) to hold for and during his natural life only, on this condition, that he shall without delay after my decease, settle and convey the same to trustees, to take place at his decease for the use and support of the preaching of the word of God at *Lyndhurst*, for ever," &c. &c. the court held clearly, That though the latter devise was void under stat. Geo. 2. yet that the life-estate to the defendant was good.

Philips v. Aldridge.  
4 Term Rep.  
264.

3. "But a will originally well made may be revoked or cancelled, and that either impliedly or expressly."

## . Of express Revocations, or cancelling of Wills.

1. It is enacted by the statute of frauds, 29 Car. 2. c. 3. That no devise of lands, tenements, or hereditaments,  
"which

"which has been in writing, shall be *revocable* otherwise than by some other *will or codicil in writing*, or other writing declaring the same: or by burning, cancelling, or tearing the same by the testator, or by some person in his presence, and by his directions. And if the former will is altered, or revoked by another, this last must be executed by the testator in the presence of three or four credible witnesses."

Under this statute it has been decided,

Cowp. 52.

1. "That the *mere act of cancelling* a will is no revocation, it must be done *animo revocandi*; and any act done with intention to cancel, shall operate to effect it."

Bibb ex dem.  
Mole & ux. v.  
Thomas  
2 Black. Rep.  
1043.

Therefore where a testator took a will which he had made, part he tore and threw it on the fire, *intending to destroy it*, but it fell off, and was saved without his knowledge; it was adjudged to be a sufficient cancelling of the will.

2. "No will can operate to cancel a former good and valid will, unless the latter will be executed with all good and legal solemnities."

Cnyons v.  
Tyrer.  
1 P. Wms. 843.

Therefore where a will was well made, and afterwards testator made another will, whereby he declared all former wills null and void, but this last was not duly executed, it was adjudged not to revoke the first will, which was good; for a good will cannot be revoked by a void one.

Mason v.  
Limbrej. quot.  
4 Burr. 2515.

So where testator made his will of real and personal estate and made two duplicates of it, one of which he kept in his own hands, and the other he delivered to *Limbrej*, the defendant. Before his death he altered in many respects the duplicate in his own possession, and greatly obliterated it, and began to write over a new will, but never finished it; nor did he ever apply to *Limbrej* to get back his duplicate. It was adjudged, that the second will being imperfect, was no revocation of the first, which should therefore be deemed the subsisting one, as evidently the testator did not mean to disintestate.

3. "Neither shall a good will be revoked by any subsequent one, unless it appears in what manner and in what points the revocation was made."

Harwood v.  
Goodright.  
Lessee of  
Rolph.  
Cowp. 87.

For where on a special verdict the jury found, "That the testator had by will devised the premises in question to the plaintiff, and that he afterwards made *another will, properly attested, different from the former, but in what points they do not know*, but they did not find that he had cancelled his

his said last will, or destroyed it, but that what was become of it they were ignorant;" it was adjudged that this should not be deemed such a revocation as should take away the title of the plaintiff, which he had under the good will, but that it should be deemed valid and subsisting.

4. " But though a will has been revoked by a subsequent one, *but not destroyed*, if the subsequent will is afterwards cancelled, the first will shall be thereby established."

Testator having made a will in favour of the defendant; six years after made another will also in favour of the defendant. After testator's death both wills were found in his desk, but *the second will was cancelled*; it was resolved that the first will was not revoked, for the second will being cancelled, it was as if it never had existed, and testator's intention appeared by both wills to be that defendant should take. And beside, the statute of frauds declaring, that where a former will is revoked by a subsequent one, and that the subsequent one should be a good one, and properly attested, and the second one here being a nullity, could not operate to revoke the first; which not being cancelled, must therefore stand.

Goodright ex  
dim. Glazier v.  
Glazier.  
4 Burr. 2542.

" But where the first will is *itself cancelled*, and also revoked by a subsequent will, if this latter will is afterwards cancelled, yet it does not set up the first."

For where testator having made his will in two duplicates, delivered one to a friend to keep for him, and kept the other himself, he afterwards made another will different from the former, and revoking all former wills, and at the same time tore off his name and seal from the former will, and cancelled it: before his death he sent for an attorney to make a third will for him, but was senseless before he arrived. After his death the first and second wills were found together, and *both were cancelled*; but the *duplicate of the first*, which he had taken from the person with whom he had left it, was found among his papers *uncancelled*: It was resolved, 1st, That the cancelling of the copy in the testator's own possession cancelled the duplicate in the possession of the person to whom he had entrusted it: and 2dly, That the first will being itself cancelled, was not set up again by the cancelling of the second.

Burtonshaw v.  
Gilbert.  
Cowp. 49.

4. " And a will may be revoked by an act which is incomplete and void in law, if the testator's intention appears sufficiently that it was so to revoke the will; as by a feoffment *" without livery,"* &c.

3 Atk. 73.

So where the testator made his will, duly executed, and devised away all his real and personal estate to his brother,

Beard v. Beard.  
3 Atk. 72.

I i

and

and he afterwards made a deed-poll, by which he gave all to his wife: though this deed was void, as a man cannot make a grant or conveyance to his wife in his lifetime, yet the chancellor (*Lord Hardwicke*) held, that it amounted to a revocation; but as it could not operate as a grant, that the person must be deemed to have died intestate.

## 2. Of implied Revocations.

*Christopher v. Christopher.* 1. The first of this description is *marriage* and the birth of a child; for these have been decided to amount to a revocation of a will made before the marriage had taken place. *quot. Dougl. 35.*

*Per Lord Mansfield.* But these events shall only be deemed a revocation where the whole estate has been disposed of by the testator, and the children are left without a provision. *Douglas 38.*

*Brady ex dem. Norris v. Cubitt.* And where such presumption does arise, yet may parol evidence be admitted to rebut the presumption, and shew that the testator did not intend to revoke the former devise: and a will which is revoked by such implication may nevertheless be republished by a subsequent instrument, properly attested, referring to it. *Douglas 30.*

*Per Lord Hardwicke in Parsons v. Freeman.* 2. If a testator has a legal estate, devises it by will, and afterwards suffers a recovery of it, this shall be deemed a revocation: and it is the same if he executes any conveyance of the same effect, and takes back a new estate. But if he only leases for years, or lives, or mortgages to pay debts, these are only revocations *pro tanto*. *1 Will. 308.*

“And the case is the same of an equitable estate.”

*Per L. Hardwicke. Parsons v. Freeman.* But if a man having the equitable estate devises it, and afterwards by legal conveyance takes the legal estate, it is a revocation: but where he obtains the legal estate under different terms and conditions, it is a revocation. As where being seised in fee of the equitable estate, he by fine and recovery took the legal estate, but subject to the uses to be declared by him and his wife. *1 Will. 308.*

*Att. 425.* So if a person devises a lease for life of which he is seised, and he afterwards purchases the reversion, this is a revocation *pro tanto*, and it goes to the heir.

5. In this action the question of *bastardy* often comes in question; the legitimacy of the reputed heir at law being questioned by the person who, in case there had been no issue of the deceased, would have been his heir.

1st. “Though a man and woman have had a ceremony performed for the purpose of marriage, yet if that has not been regular, it is void, and the issue are bastards.”

To this effect it is enacted by statute 26 G. 2. c. 33.  
 " That if any person shall solemnize matrimony in any  
 " other place than a church or public chapel (except by special  
 " licence from the archbishop of Canterbury) or without pub-  
 " lication of banns or licence in a church or chapel, that the  
 " marriage shall be void. And further, That all marriages  
 " solemnized by licence, where either of the parties (not  
 " being a widow or widower) is under the age of twenty-  
 " one years, which shall be had *without the consent of parents*  
 " *and guardians*, shall be absolutely void."

1. This act of parliament, requiring that all marriages Bull. N. P.  
 shall be performed in a church or chapel, and with licence 113.  
 or publication of banns, *does not extend to marriages in Scotland*  
*or foreign parts*, nor to any marriages among any *sectaries*;  
*as Quakers, Jews, &c.* whose marriages are good if solemn-  
 ized according to their own rites, and both the parties are of  
 the same persuasion.

2. " Neither does that clause concerning the marriages  
 " of *persons under age*."

For where in this case the appellant and respondent, being Compton v.  
 both *English* subjects, and the appellant under age, ran away Bearcroft. cor.  
 without the consent of her guardian, and were *married in* Deleg.  
*Scotland*: on a suit brought in the Spiritual Court to annul 1 Dec. 1768.  
 the marriage, it was held to be good. Buller N. P.  
 114.

3. The statute does not take away the evidence arising Rex v. Preston.  
 from cohabitation; though if the evidence be clear that the next Feverham.  
 marriage was not celebrated according to the requisition of the Mich. 33 G. 2.  
 act, it is totally void, and no declaratory sentence of the ec- B. R.  
 clesiastical court is necessary to annul it. The case here was, Buller N. P.  
 that the man was under the age of twenty-one years when 114.  
 he married. Burr. Sett. Caf.  
 486. S. C.

Therefore in this case where the father and mother of a Stockland v.  
 pauper had cohabited together for thirty years as man and wife, Charland.  
 and after the death of the wife, the husband was produced to Burr. Sett. Caf.  
 prove that no marriage had ever actually taken place, which 508.  
 the sessions refused: on motion to quash the order of sessions,  
 Lord Mansfield was of opinion, that thirty years cohabitation  
 as man and wife was sufficient evidence to found an order of  
 removal on; and the order of sessions was affirmed.

And note, That where there has been a sentence of the Jones v.  
 ecclesiastical court, in a suit *causa jactitationis maritaggi*, that Carth. Bow.  
 there was no marriage, and that the parties are free of one  
 another: that that sentence while unrepealed, is conclusive of  
 the fact.

## EJECTMENT.

2. By the same statute it is enacted, "That all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and shall be entered in the register; in which entry shall be expressed whether the marriage was celebrated by banns or licence, and signed by the minister and parties married, and attested by two witnesses.

"But if the marriage has been regularly solemnized, any subsequent irregularity in the entry shall not affect its validity."

St. Devereux  
v. Much  
Dewchurch.  
Burr. Sett.  
Case 306.  
Buller N. P.  
114. S. C.

For where a witness in this case proved, that he and another witness were present when a marriage was solemnized between *John* and *Susannah Meredith*, by the minister of the parish by banns, and an entry was produced from the parish-book, viz. "1758, *John Meredith* and *Susannah Jenkins* were married by banns," but this entry was not signed by the minister, parties, or witnesses; it was contested that the marriage was not legally proved. *Per curiam*, In a suit of jactitation of marriage in the Spiritual Court, while the parties are alive, they are put to prove all ceremonies: but in all other cases proof by witnesses who saw the marriage, is *prima facie* sufficient; and whoever would impeach it must shew wherein it is irregular. Here the fact of the marriage is proved, and the *register* is not of the essence of the marriage, nor affects its validity.

3. "Where no evidence can be had of the marriage having been solemnized, collateral proof, as from declarations or constant cohabitation, shall be sufficient."

May v. May.  
Hill 17 G. 2.  
Bull. N. P.  
127.

Therefore, where in this case the preamble of an act of parliament reciting that the plaintiff's father was not married, and to the truth of which he was proved to have sworn, was given in evidence, yet it being proved on the other side that there had been a constant cohabitation between the parties, and that the deceased had on all other occasions owned her as his wife, the plaintiff obtained a verdict.

"But that presumption shall only hold place where no positive evidence can be had; for in case proof of the marriage can be had, and that by the evidence even of the parties themselves, such shall be admissible and good."

St. Peter's  
Worcester v.  
Old  
Swinford.  
Burr. Sett.  
(sf. 25.  
Bull. N. P.  
112.  
S. C.

For where on an appeal the case was stated, that *Josiah Heighington*, father of the pauper, gave in evidence, that for seven years he travelled about with *Hannah Afke*, during which time they cohabited as man and wife, but were never married, and that during that time the pauper was born



born and christened as the legitimate child of him and *Hannah Afke*: the evidence of the father was here held to be good and admissible to prove the fact of no marriage having ever taken place between the parties, though it went to bastardize his issue.

4. "But though a marriage has in fact legally taken place between the parties, yet may the issue born during its subsistence be bastards: as if the husband is proved to labour under inability from any cause; or if there has been no access, &c. or the child be born out of time."

## 1st. In Cases of Inability in the Husband.

1st. Where in ejectment on a trial at bar, the question was, *Ex dim. Lomar v. Holmden.* Whether the lessor of the plaintiff was the sole heir of *Caleb Lomar*, deceased? It was proved fully, that he was frequently in *London*, where his wife lived, so that access must be presumed. The defendants were admitted to give evidence of his inability, from a bad habit of body; but their evidence not going to an *impossibility*, but to an *improbability* only, that was not thought sufficient, and the plaintiff had a verdict. *5 Stra. 940.*

So where a man had been divorced from his wife *causa frigiditatis et impotentiae*, and afterwards married again, and his second wife had issue; it was contended that they were bastards, by reason that the sentence of divorce established the question of his inability; so that all issue born after of his wife should be deemed bastards. But the court held them legitimate; for the sentence did not establish a perpetual inability: and a man might be *babilis et inhabilis diversis temporibus*. *Bury's case. 5 Co. 98. b.*

## 2nd. In Cases where there has been no Access.

"Where it appears clearly in evidence that there has been no access, the issue shall be bastards."

As where a married woman was brought to bed of a child during her husband's absence at *Cadix*, and it was proved that he had not been in *England* from the time of conception to her delivery; the child was held clearly to be a bastard. *Rex v. Abberton. 1 Ld. Raym. 135.*

"And though access may be presumed, as from the parties living not far distant, yet may evidence still be admitted to prove, that in fact no access had taken place."

Pendrell v.  
Pendrell.  
2 Stra. 925.

For where in an issue out of chancery to try whether the plaintiff was the heir at law of *Thomas Pendrell*, it was agreed that the plaintiff's father and mother had been married, and had cohabited for some months; that they parted, she staying in *London*, and he going into *Staffordshire*; and that at the end of three years, the plaintiff was born. The plaintiff rested his case on the presumption of law in favor of legitimacy, and on there being some doubt if the plaintiff's father had not been in *London* during the last year; but this was encountered by strong evidence of want of access. The Chief Justice *Raymond* over-ruled the old doctrine of legitimacy if the father is within the four seas, and left to the jury to decide on the evidence, Whether there had been access or not? and the jury found against the plaintiff.

“ And the child of a married woman may be proved to be a  
“ bastard by other evidence than the non-access of a hus-  
“ band.”

Goodright ex  
dim. *Tomp-  
son v. Saul*.  
4 Term Rep.  
356.

For where in this case, the question turned on the legitimacy of *Joseph Turner Hales*, under whom the defendant derived: to prove that he was illegitimate, the lessor of the plaintiff proved the marriage of his mother, by her maiden-name of *Tilyard* with one *Simon Kilbourn* in 1705; that she lived with him in *Norwich*, for some time, without having any children; that *Kilbourn* left *Norwich*, after which she cohabited with a person of the name of *Hales*: that she and *Hales* lived publicly as man and wife, during which time *J. T. Hales* was born, and that he was always reputed a bastard in the family. Where the husband was during that time did not appear; but an old witness said, that he went to *London*, where it was supposed that he remained, and that he returned to *Norwich* after his wife's death. It was further proved, That *J. T. Hales* always went by that name, except in one instance where he sold an estate, which had been devised to his mother by her father; and in the conveyance he styles himself *Joseph Kilbourn* otherwise *Hales*. It was proved also that his mother was buried by the name of *Kilbourn*: the counsel for the defendant then insisted, that on these facts given in evidence by the plaintiff, that *J. T. Hales* should be deemed legitimate, as no direct proof was given of non-access by the husband, and that he should not be bastardized by proof, that another person had cohabited with his mother: the judge being of that opinion directed a verdict for the defendant. On a motion for a new trial, the learned judge himself changed his opinion respecting the necessity of the proof of non-access, *et curia consentiente*, a new trial was granted.

*St. George v.*  
*St. Margaret's*,  
*Westminster*.  
*Salk* 123.

So where a woman is separated from her husband by a divorce of *a mensa et thoro*, the children she has during a separation

paration are bastards; for a due obedience to the sentence shall be intended, unless the contrary is shewn; but if a husband and wife separate and live apart, without sentence of a divorce, the children shall be taken to be legitimate, and so deemed till the contrary be proved: as in the case of *Pendrell v. Pendrell*. So if a special verdict finds no access, the child is a bastard.

So where a case of removal stated that there had been no access for seven years, though there was evidence that the husband was living, it was held sufficient to bastardize the issue; is if there was no access it was immaterial whether the husband was living or not. *Rex v. Inhabitants of Bedall in Yorksh.* 2 Stra. 1076.

3. "But where the issue of persons married is to be bastardized by evidence of *no access*, the *wife shall not be admitted to prove that fact*, for that may be proved by the evidence of others; but she is an admissible witness to the fact of *incontinence*, on account of the necessity, from the want of other proof."

And therefore where the wife gave evidence of her having had connection with the defendant, and that he was father of the child, and that her husband had had no access to her for a great length of time, and there was no other evidence of the husband's not having had access to her, but there was evidence that he was within seven miles of her all the time; it was held, that her evidence as to the fact of incontinence was good, as it might be the only witness of it that could be had; but that if the non-access that there might be others, and that so her evidence was insufficient to that fact. *Rex v. Reading.* B. R. Mich. 8 Geo. 2. Bull. N.P. 112.

And in this case the same point was expressly decided. *Rex v. Rook.* 1 Will. 340.

. Where the Child has been born out of Time.

"It is not precisely settled what shall be deemed the exact and certain time for a child to be born after the death of the father, in order to be held to be legitimate." *1 Danv. 726.*

Where the feme went *eleven months* after the death of the husband, it was resolved that the issue was not legitimate; it was born *post ultimum tempus mulieribus pariendo constitutum*. *Trin. 18 Ed. 1. Rot. 13. Buller N P. 114.*

But in this case, where the husband died the 23d of *March*, and the child was born the 5th of *January* following, which was nine solar months and thirteen days; it was proved that the woman had been much abused, and was compelled to lie in the streets; and physicians giving *Alfop v. Bowtrell.* Cro. Jac. 541.

ing evidence that such treatment might delay the birth, the child was held to be legitimate.

Pride v. Earle  
of Bath and  
Montague.  
Salk 120.

And note, That the rule *quod non iustum est post mortem aliquem bastardum facere*, &c. holds only in the case of *bastardizans et mulier quajus*. But if *H.* marries a woman, and she marries again, living *H.*, the last marriage is void, without any divorce, and the jury shall try the fact, which proves it not a marriage.

Goodright ex  
dim. Stevens v.  
Moss.  
Cowp. 591.

And this rule, That the parents shall not be allowed to bastardize their issue, holds only where it is to bastardize issue *born after marriage*; for either parent may be an evidence in their life-time that a child was born before marriage: and general declarations to that effect, or an answer in chancery, are good evidence to prove a child born before marriage, but not to bastardize a child born after marriage.

6. "Where an ejectment is brought for lands, which have been passed by a *fine*, or of which a *recovery* has been suffered; the production of the fine and recovery is a complete bar," not only to the parties and privies to the fine and their heirs, but to all other persons: but those who are not of full sound mind, or full age, in prison, women covert, and not within the four seas, such persons have five years after the proclamations made, after their respective disabilities are removed, to make claim; stat. 18 Ed. 1 & 4 H. 7. 21."

To this there is an exception by stat. 32 H. 8. 36, of fines levied by women, of lands of the gift of the husband or his ancestor after the husband's death, assigned to her in tail for jointure, and also of lands intailed by act of parliament, or letters patent, and of which the reversion is in the crown, of which a fine or recovery is no bar to those in reversion.

Chettle v.  
Pound  
Buller N. P.  
230 Allen's case  
Clayt 51. S. P.

And where a fine is to be proved with proclamations (as it must be to bar a stranger) the proclamations must be examined with the roll, for though the chirographer is authorized by the common law to make out copies to the parties to the fine itself, yet he is not appointed by the statute to copy the proclamations; and therefore his indorsement on the back of the fine is not binding.

Doe ex dim.  
Foster v.  
Williams.  
Cowp. 621.  
Vid. S. C. post.  
482.

But it seems that if a fine is produced for the defendant the plaintiff may put him on proving, That the person who levied the fine was in possession at the time; and if he cannot prove it, the fine is no bar.

2. "As to the validity and effect of a recovery. A *præcipe* does not lie against a person that is not seised of the freehold; therefore when a recovery is shewn, it is necessary to prove seisin in the tenant to the *præcipe*;  
"however,

" however, in an ancient recovery seisin will be presumed,  
 " especially where possession has gone along with it, for that  
 " induces a presumption that every thing was regularly  
 " done."

As where on a trial at bar, the plaintiff claimed under an old entail in a family-settlement, by which part of the estate appeared to be in jointure to a widow at the time the son suffered a recovery, which was in 1699, under which the defendants claimed; the defendants were not able to prove the surrender of this life estate, and it was therefore insisted that there was no tenant to the *præcipe*, and so that the recovery was no bar: to obviate this difficulty, the defendants offered in proof the book of an attorney, then dead, in which were charges for drawing the surrender of the tenant for life: and they further relied on the presumption from the length of time that all things were regular, and a surrender made. The court held the book of the attorney good evidence, on which to found a presumption; and seemed to think even without that, after such a length of time (forty years) that they would presume a surrender.

Warren ex dim.  
 Webb v  
 Grenville.  
 2 Stra. 1129.

" But in a modern recovery the court will expect some evidence whereon to ground a presumption, or proof of an actual surrender."

As where the tenant in tail in remainder, suffered a recovery of the lands then held by the widow of his brother; and there was no proof of any surrender by her: the court held, That they would not presume a surrender, particularly, as immediately on her death the ejectment was brought by the person entitled, if the fine was void.

By 14 Geo. 2. c. 20. it is enacted, " That all common recoveries, suffered or to be suffered without any surrender of the lease for life, shall be valid, provided it shall not extend to make any recovery valid, unless the person intitled to the first estate for life, or other greater estate, have, or shall convey, or join in conveying an estate for life at least to the tenant to the *præcipe*. And by the same act, where any person has or shall purchase for a valuable consideration, any estate, whereof a recovery was necessary to complete the title, such person and all claiming under him, having been in possession from the time of such purchase, shall and may after the end of twenty years from the time of such purchase, prove in evidence the deed making a tenant to the *præcipe*, and declaring the uses; and the deed so purchased (the execution thereof being duly proved) shall be deemed sufficient evidence that such recovery was duly suffered, in case no record can be proved of such recovery, or the same should appear not regularly entered: provided,  
 " That

Goodtitle ex  
 dim. Bridges v.  
 D. of Chandos.  
 2 Burr. 1065.

“ That the person making such deed had a sufficient estate  
 “ and power to make a tenant to the *præcipe*, and to suffer  
 “ such common recovery: it is further enacted, That every  
 “ common recovery suffered or to be suffered, shall, after the  
 “ expiration of twenty years, be deemed valid, if it appear  
 “ on the face of such recovery, that there was a tenant to  
 “ the writ; and if the persons joining in such recovery had a  
 “ sufficient estate or power to suffer the same, notwithstand-  
 “ ing the deed to make a tenant to such writ shall be lost: it  
 “ is further enacted, That every recovery shall be deemed  
 “ valid, notwithstanding the fine or deed, making a tenant  
 “ to such writ, shall be levied or executed after the time of  
 “ the judgment given, and the award of seisin; provided the  
 “ same appear to be levied or executed before the end of the  
 “ term in which such recovery was suffered, and the persons  
 “ joining in such recovery had a sufficient estate and power to  
 “ suffer the same.”

Garrett v.  
 Lytster.  
 3 Lev. 25.

6. If the lessor of the plaintiff's title is under an assignment by an administrator, if he cannot produce the letters of administration, the book of the ecclesiastical court where the order was entered for the granting of them, is good evidence, or a copy of the book will be sufficient; but such will not be sufficient for the administrator himself, unless he proves the administration under the seal of the court was lost.

Anon.  
 3 Ld. Raym.  
 735.

So if an ejectment is brought against the devisee of a copyholder, *by the lord or by a stranger*, the recital of the will in the admittance is good evidence of the devise: but if the ejectment is *by the heir* against the devisee, the will itself must be proved.

Bull. N. P. 248.

7. An *old terrier or survey of a manor*, whether ecclesiastical or temporal, may be given in evidence; for there can be no other way of ascertaining old boundaries or tenures.

Ibid.

But a *terrier of glebe* is not evidence for the parson, unless signed by the churchwardens, as well as the parson, nor even then if they are of his nomination; and though it be signed by them, it deserves little credit, unless it be likewise signed by the substantial inhabitants: but it is in all other cases evidence against the parson.

Anon.  
 1 Stra. 95.

So where the question in ejectment was, “*parcel or not*,” a *survey* taken by one of the parties, without the privy or concurrence of the other, was held to be no evidence.

Bourne v.  
 Turner.  
 1 Stra. 6:3

8. The *tenant in possession* is not an admissible witness for his landlord; for he is liable to an action for the mesne profits; and so being interested is inadmissible.

“ Neither

"Neither is he a witness to *prove possession* in his landlord, for it is to support his own possession."

For where a fine was produced to bar the plaintiff's right, levied by a *Mrs. Galton*, under whom the defendant claimed; it was objected for the plaintiff, that the fine alone was not sufficient, unless accompanied with some evidence to shew that *Mrs. Galton* was in possession when the fine was levied, or had received rent: to prove possession, the *tenant in possession upon whom the ejectment had been served* was called, but was rejected by Lord *Mansfield*; and on a motion for a new trial, the court concurred in opinion that the witness was inadmissible.

*Doe ex dim.*  
*Foster v.*  
*Williams.*  
*Cowp. 621.*

9. If an executor takes no beneficial interest under a will, he is a competent witness to prove the sanity of the testator; and if he or any other person who is interested, executes a surrender or a release of his interest, he may be examined as a witness to establish the will, though the person to whom the surrender or release was offered to be made, refused to accept of it.

*Goodtitle, Les-*  
*see of Fowler v.*  
*Wellford.*  
*Douglas 134.*

And in this case a person who had sold an estate, but without a covenant for a good title or a warranty, was allowed to be a witness to prove the title of the vendee.

*Bushby v.*  
*Greenleaf.*  
*1 Stra. 445.*

10. An heir-apparent may be a witness to prove the title of land, but a remainder-man cannot, for he has a present estate in the land; but the heirship of the heir is a mere contingency. Here the case was, The heir of a bankrupt was brought to prove a debt due to him in an action by the assignee, and an objection was taken to his evidence, that the surplus of the real estate (which is only to come in aid of the personal) being to go to the bankrupt and his heir, that the heir by swearing as to the personal estate, has the benefit that he discharges the real estate as to so much; but the Chief Justice over-ruled the objection, as too remote a contingency.

*Smith v.*  
*Blackham.*  
*Salk. 282.*

11. To prove that a name subscribed to a will was forged, a clerk of the Post-Office accustomed to inspect franks for the detection of forgeries, was called to prove that the handwriting subscribed to a will was an imitated hand, and not a natural one; and also to prove that two hands, suspected to be imitated hands, were written by the same person.

*Goodtitle ex*  
*dim. Revett v.*  
*Braham.*  
*4 Term Rep.*  
*497.*

12. "Hearsay-declarations as to the person who was seised, or whether lands are parcel or not parcel, are in many cases admissible evidence."

As

Holloway v.  
Rakes.  
Mich. 12 Geo.  
3 quot. 2 Term  
Rep. 55.

As where the lessor claimed as devisee in remainder, under a will made twenty-seven years before, under which there had been no possession, and therefore seisin in the devisor was necessary to be proved; a witness was called, who swore to declaration of the tenant at that time in possession, that *he held as tenant to the devisor*: it was objected that this was mere hearsay-evidence, made by a person not upon oath: but the court held it to be good evidence.

Davies v.  
Peirce.  
2 Term Rep. 50.

So where the question was, Whether a certain tenement was parcel of the lands of *Bulchystullen* in *Cardiganshire*, or *Llynff* in the same county, declarations by the tenant who had rented both farms, but was then dead, that he rented the two parcels of land of different landlords, and that the *locus in quo* was parcel of one of them, shall be admissible evidence to ascertain of which of them the *locus in quo* is part.

## 5. OF THE VERDICT, JUDGMENT, AND WRIT OF ERROR, WRIT OF POSSESSION, AND OTHER PROCEEDINGS.

### I. OF THE VERDICT.

1. "In ejectment the plaintiff shall always recover according to the title which he makes out, though not consistent with that stated in the declaration."

Ante 447.

As in the case of *Bedford ex dem. Carruthers v. Dendin*, ante 447, where the plaintiff having a title to but five years, yet declared for seven, recovered notwithstanding, according to his title.

So the plaintiff may declare for any number of acres, and recover so many only as he proves a title to.

2. "If the declaration in ejectment goes for several things, and there is a general verdict, though the declaration is bad as to part, yet the plaintiff may recover for the remainder."

Wood v. Payne.  
Cro. Eliz. 186.

As where the declaration was for a messuage or tenement, and four acres of land belonging to the same, and there was a general verdict; on a motion in arrest of judgment it was decided, That though the declaration as to the first part for a messuage or tenement was bad for uncertainty, yet it was held to be good as to the four acres, which could not be said to belong to any house. But the damages and costs being entire, it was held, that the plaintiff could not have judgment as to them.



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3. In a recovery in ejectment of one hundred acres of Anon. land, twenty of pasture, &c. without mention of any *house* Dyer 47. a. or *garden*, it was nevertheless held that the plaintiff should recover all the erections thereon.

### 2. OF THE JUDGMENT AND WRIT OF ERROR.

1. The casual ejector can in no case confess a judgment. Hooper v. Dale. 1 Stra. 531.

2. Though the plaintiff has had a judgment regularly obtained, if he has not lost a trial, the court will set it aside upon payment of costs and taking notice of trial; for though the defendant may afterwards bring his ejectment, yet change of possession in consequence of the plaintiff's judgment, may be of great loss and inconvenience to the defendant; as felling of timber, &c. Dobbs v. Passer. 2 Stra. 975.

3. By stat. 16 Car. 2. c. 8. s. 17. "If the defendant in ejectment brings a writ of error, he shall be bound to the plaintiff in such reasonable sum as the court shall think fit."

This sum is generally double the rent.

4 Burr. 2502.

"Under this statute the defendant is intitled by law to his writ of error, if he offers to become bound as the statute directs."

Therefore where in this case the lessor of the plaintiff swore that the defendant was insolvent, and also that he had a mortgage against the land to more than it was worth, yet the court held the defendant intitled to his writ of error, he becoming bound in double the rent. Evan Thomas v. Goodtitle. 4 Burr. 2501.

And by the same statute, "In case judgment be affirmed upon a writ of error, the court may award a writ of inquiry as well of the mesne profits as of the damages by reason of any waste committed after the first judgment."

Though in this case where the defendant brought a writ of error in parliament upon a judgment in ejectment, the court obliged him to enter into a rule not to commit waste or destruction during the pendency of the writ; and he justified in 400l. Wharrod v. Smart. 3 Burr. 1823.

4. A writ of error cannot be sued out in the name of the casual ejector. 2 Burr. 757.

And if judgment has been signed against the casual ejector by default, when plaintiff moves for leave to take out execution against the casual ejector, is the time when the landlord, if he brings a writ of error, is to shew that as a cause why the plaintiff should not have leave to take out execution; and if

George ex. dim.  
Bradley v.  
Wilford  
2 Burr. 756.

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if he then omits it, and leave is given, the execution will not be set aside.

4. "Nothing shall be assigned for error which will make it necessary to go again into the title of the lands."

Wilkes v.  
Jordan.  
Hob. 5.

For where, after judgment for the plaintiff, error was assigned, that the lessor of the plaintiff was seised in right of his wife, and that she was dead before judgment, and that so the lease was determined; it was adjudged, That as the error depended upon the death of one, not party to the suit, that it could not be allowed; for the plaintiff might say that the lessor was seised in his own right, or the like, and so the title would be to be re-examined on a writ of error.

## 3. OF THE WRIT OF POSSESSION.

1st. If the lessor of the plaintiff has judgment in ejectment, it is to recover the term, upon which an *habere facias possessionem* issues to the sheriff, to put the plaintiff into possession.

Withers v.  
Harris.  
Salk. 258.

2. But if a year and day pass after judgment, the plaintiff cannot have an *habere facias possessionem* without a *scire facies* first issuing.

Doe ex dim.  
Beyer v. Roe.  
4 Burr. 1970.

3. Where the lessor of the plaintiff died in the vacation, and the writ of possession was taken out after his death, but was tested of the last day of the preceding term, and so overreached the time of his death, the writ was held to be regular.

## 4. OF THE COSTS.

Anon.  
1 Will. 130.  
Noke v.  
Wyndham.  
1 Stra. 604.

1. If the lessor of the plaintiff is an *infant*, the court will on motion stay proceedings till he gets somebody to enter into a rule to pay defendant his costs, if defendant has a verdict; an infant not being liable to costs.

Doe ex dim.  
Lucas v. Fulford.  
3 Burr. 8177.

2. Where the lessor of the plaintiff lived in Ireland, the court stayed the proceedings till he had given security for payment of costs, though the ejectment was brought under the direction of the court of chancery, and security had been already given there for 40l.

3. "Though the lessor of the plaintiff's title is at an end, yet the court will not stay proceedings."

Thrustout ex dim.  
Turner v. Gray.  
2 Stra 1056.

As where his title was as *tenant for life*, and it appearing that he was dead, defendants applied to stay the proceedings; but the court refused the motion, as the plaintiff had a right to proceed for damages and costs; but they obliged him to find security for costs.

4. If there is an ejectment against several, and the plaintiff is nonsuited, he may pay the costs of the nonsuit to which of the defendants he pleases. *Jordan v. Harper.* 1 Stra. 546.

5. By stat. 8 & 9 W. 3, c. 11. "In ejectment against several, if any one or more is acquitted by verdict, he shall recover his costs against the plaintiff, unless the judge shall certify in open court that there was good cause for making such person a defendant."

# 5. OF BRINGING A SECOND EJECTMENT.

1. The plaintiff may bring a second ejectment for the same lands; but unless it appears to the court that there is good ground for bringing such second ejectment, the court will stay proceedings until the costs of the first are paid. *Anon.* Salk. 253. *Crumble v. Sedley.* 1 Stra. 354. *Doe v. Alston.* 1 Term Rep. 491. S. P.

As where it is done merely for vexation, or there is any thing fraudulent in the proceedings.

And though the lessor of the plaintiff had neglected in the former ejectments to enter into the consent-rule, yet proceedings were stayed until payment of costs. *Roe ex dem. Chambers v. Law.* 2 Black. Rep. 1180.

"But where the plaintiff does shew some good and satisfactory grounds to the court, he may be allowed to bring the second ejectment without paying the costs of the first." *Smith ex dem. Ginger v. Barnardiston.* 2 Black. Rep. 1704.

As where the plaintiff declared on one demise, but afterwards finding it necessary to join trustees, he delivered a new ejectment, the court allowed it without payment of costs. *Short v. King.* 1 Stra. 681.

"But a mistake alone seems not to be sufficient to exempt the plaintiff from payment of costs."

For where Lord Coningsby brought an ejectment, and had a rule for a trial at bar, and finding it to be on a wrong demise, delivered new ejectments; and coming again for a trial at bar, the court refused to grant it, but on payment of the costs of the former ejectment. *Ld. Coningsby's case.* 1 Stra. 548.

"And though there may be some difference as to the parties in the ejectments, yet if the question and title is the same, the costs of the former ejectment shall be paid before the second is suffered to proceed."

As where an ejectment had been brought under the demise of the husband and wife, and the plaintiff had been nonsuited; and after the husband's death the wife brought a new ejectment, the court stayed proceedings in it till the costs of the first ejectment were paid. *Doe ex dem. Duchess of Hamilton v. Hamilton.* 2 Stra. 1152.

*Fenwick v.  
Grosvenor.  
Sask. 258.*

2. After a verdict in ejectment and judgment for the plaintiff, if the defendant brings a writ of error, he shall not be allowed to bring an ejectment until he has quitted possession, or the tenants have attorned to the plaintiff, so that the plaintiff is in possession, and he out; for if the plaintiff in the first ejectment was to get judgment in this last ejectment, there would be two judgments for the same thing; but if the defendant goes on a different title, proceedings will not be stayed in the second ejectment.

#### 6. OF TRESPASS FOR THE MESNE PROFITS.

*3 Black. Com.  
205.*

1. "The verdict in ejectment having established the right of the plaintiff; from the time that his title accrued, the defendant is a trespasser, and the plaintiff entitled to recover from him the damages for his unjust possession, equal to the value of the lands during that time. This is done by an action of *trespass*, the damages in ejectment being usually but one shilling."

But it seems to be a point not clearly settled, how much the plaintiff is entitled to recover for the mesne profits.

*De Costa v.  
Atkyns.  
Per Eyre Ch. J.  
Hill. 4 G. 2.  
Buller N.P. 87.*

In this case it is held, That the plaintiff is not bound to claim the mesne profits, *only from the time of the demise*; for if he proves his title to have accrued *before that time*, and proves the defendant to have been longer in possession, he shall recover antecedent profits.

*Ibid. and  
2 Burr. 667.*

But in such case, if the plaintiff goes for time *before the demise* laid in the declaration in ejectment, the defendant is at liberty to *controvert his title*; but if he goes only for the time from the demise laid, the record of the recovery in ejectment is conclusive evidence of the plaintiff's title from that time

*Collingwood &  
Ramsey v. several  
Defendants.  
1 Sid. 239.*

and cannot be controverted; and in such case it is sufficient for the plaintiff to produce the judgment in ejectment, and the writ of possession executed: so against a precedent occupier the record is no evidence, and therefore against him the plaintiff must shew and prove a title.

"So with regard to possession another doubt arises."

*Stanynought v.  
Cofins.  
2 Barnes 367.*

In this case it is held, That the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man makes his will and dies, the devisee will not be entitled to the profits till he has made an actual entry.

*2 Roll. Abr.  
Title Trespass  
per Relation.*

On the other hand, it is laid down, That when the plaintiff has once made an actual entry, that that will have relation

lation to the time of his title accrued, so that he may recover the mesne profits from that time.

But however, if a subsequent entry has a relation back to Buller N. P. the time of the plaintiff's title accrued, yet the defendant may <sup>88.</sup> plead the statute of limitations, and so protect himself from all but the last six years.

2. This action of trespass for the mesne profits may be brought either by the *nominal plaintiff in ejectment*, or by the *lessor of the plaintiff himself*, even in the case of a judgment by default against the casual ejector; but if the action is brought by the nominal plaintiff in ejectment, the court will, upon application, stay proceedings till security is given for answering the costs. Affyn v. Par. Burr. 665. Buller N. P. 89.

3. If one *tenant in common* recovers in ejectment against the other, he may maintain an action of trespass for the mesne profits; though the contrary doctrine is expressly laid down in *Litt. f. 323. Co. Litt. 199.* Goodtitle v. Toomba. 3 Will. 118.

4. Where the judgment is against the *tenant in possession*, and the action of trespass is brought against *him*, it seems sufficient to produce the judgment; *without proving the writ of execution executed*; because by entering into the rule to confess, the defendant is estopped, both as to lessor and lessee, so that either may maintain trespass without proving an actual entry: but where the judgment was against the *casual ejector*, and so no rule entered into, the lessor shall not maintain trespass without an actual entry, and therefore ought to prove the writ of possession executed. Thorp v. Fry. O. & Stra. 3. Buller N. P. 87.

In trespass for the mesne profits, if the judgment has been against the casual ejector, and no writ of possession executed, the defendant in possession may controvert the title, if he has not been made a defendant in the ejectment, and had a verdict against him, and therefore the recovery in ejectment is not against him conclusive evidence. Jefferies v. Dyson. 2 Stra. 960.

5. In trespass for the mesne profits against the tenant in possession after a recovery in ejectment by default against the casual ejector, the tenant cannot *pay the money into court*, for the action is for a tortious occupation from the time the tenant had notice of the title of the lessor of the plaintiff. Holdfast v. Morris. 2 Will. 115;

6. Where this action is brought after a judgment by default against the casual ejector, it is usual for the plaintiff to recover the costs of the ejectment as well as the mesne profits. Buller N. P. 88.

## CHAPTER X.

## The Action of Slander.

**S**LANDER is the defaming a man in his reputation, by speaking or writing words from whence any injury in character or property arises, or may arise, to him of whom the words are used.

*Cafe de Libellis*  
*Famosis.*  
*5 Co.*

Slander may be committed, 1st, By words: 2dly, By writing, which is called, by *libel in scriptis*: 3dly, By pictures, or representations of that sort, which is called *libel sine scriptis*.

In treating of this action I shall first consider each species of slander now laid down in its order, and the rules of construction adopted by the courts: 2d, The pleadings: 3d, The verdict, judgment, and costs.

## I. OF SLANDER BY WORDS.

Words for which this action may be maintained are, either such as are in themselves actionable, or such as become so by reason of some special damage arising from them.

## 1st, OF WORDS IN THEMSELVES ACTIONABLE.

These are, 1st, Which bring a man into any danger of legal punishment; as to say, "That he poisoned another:" 2dly, Which may operate to exclude a man from society; as to say, "That he hath an infectious disease:" 3dly, Which injure a man in his trade or profession; as to call a *trader* a *bankrupt*: 4thly, Which charge a man in a public capacity or office with principles inconsistent with his office; as to say of a *justice of peace* "that he was a Jacobite, and for bringing in the pretender."

## I. OF WORDS ACTIONABLE, FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN TO THE DANGER OF LEGAL PUNISHMENT.

1. "These words must charge a *fact to have been committed*; for to charge a man with *bad or evil intentions*, is not sufficient."

As

As where the defendant said of the plaintiff, "He is a brawler and quarreller, and gave his champion counsel to kill me, and then fly the country;" these words were adjudged not to be actionable, for they charge no fact committed, and the purposes or intentions of a man without action are not punishable by law. *Raton v. Allen*, 4 Co. 16. b.

So where the words were "He is a troublesome fellow, Bland's cafe. and I doubt not to see him indicted at the next assizes for sheep-stealing;" these words were adjudged not to be actionable, as not charging the party with any fact committed. *Hutt. 18.*

"For the words should import some degree of *guilt*."

So that to say a man is *in gaol* for stealing a horse, is not actionable; for the person might be innocent, and the words only import his being in on suspicion. *Steward v. Bishop*, *Hutt. 2.*

But in this case, when the words were of the same import, "he was put into the round-house for stealing ducks at *land*;" the plaintiff had a verdict, and on a motion in arrest of judgment, the court held, That he should recover, the jury having found them to be *false* and *malicious*. *Beaver v. Hiden*, 2 Will. 300.

"On this ground *adjective words* are actionable or not, according as they *presume an act committed or not*."

As where the words laid were, "he is a *perjured old knave*;" that distinction was taken; so that if one calls another *sedition* or *thievish* knave, these words are not actionable, for they only import an inclination to sedition or theft, not that the party ever was guilty of either; but the word *perjured* imports an act committed, and so is actionable. *Brittridge's case*, 4 Co. 18. b.

2. "It is not necessary to make words actionable under this head, that they *endanger the person's life*, or charge him with felony, for to charge him with any lesser crime, for which he is *liable to prosecution*, is actionable: as to say he hath gone about to get poison to kill the child that such a woman goeth with (which is no felony) yet these words are actionable." *Finch's Law*, 186.

So where the words were, "You are a thief—Of what? of every thing;" these were held to be actionable, though the theft might be of what was no felony; as apples from a tree, for that the court would intend it to be of every thing of which he could be a thief. *Morgan v. Williams*, 1 Stra. 141.

And Note, That where a person had been a thief, but a general pardon of all felonies had passed, of which he had been taken. *Cuddington v. Wilkins*, *Hob. 81.*

taken the benefit, and a person afterwards called him "Thief;" the words were held to be actionable, he being cleared of all guilt by the pardon.

3. "Though the words may import a charge of felony, yet "if it appears that *the fact charged could not have happened*, "this action will not lie."

Snag v. Gee.  
4 Co. 16. a.

As where the plaintiff declared that the defendant, *being a wife then living*, said of the plaintiff, "He has killed my wife, he is a traitor:" on demurrer the words were adjudged not to be actionable, for that the wife being living, the plaintiff could never be brought into danger; and so the words were vain, and no scandal.

The second class of actionable words are,

## 2. WORDS WHICH OPERATE TO EXCLUDE A MAN FROM SOCIETY.

Taylor v.  
Packins.  
Hill. 4 Jac.  
B. R.  
Cruttal v.  
Horner.  
Hob. 219.  
James v. Rut-  
legh.  
4 Co. 17. a.

As to say of a man that "He is a leper, or hath got the leprosy," is actionable; for "a leper" shall be removed from the society of men by a writ *de leproso amovendo*. 1 Roll. Ab. 44.

So where the words were, "He is full of the pox; I marvel that you will eat with him: these words were adjudged to be actionable.

Carlisle v.  
Mapledoram.  
Pasc. 28 Geo. 3.  
2 Term Rep.  
473.

But the words must charge the person with having such disorder *at the time of speaking the words*; for if not, the words do not operate to exclude the person from society: as "he *hath* given the bad disorder to several," is not actionable, as not spoken in the present tense.

Taylor v. Hall.  
2 Stra. 1189.

So where the words were "That he *had had* the pox;" they were held not to be actionable; for it is avoiding him for fear of contagion, and refusing to keep him company; that is the legal notion of damage; and when he is cured, these inconveniences will not attend him; and for that judgment was arrested.

The third class of words in themselves actionable are,

## 3. WORDS WHICH INJURE A MAN IN HIS TRADE OR PROFESSION.

Day v. Buller.  
3 Will. 59.

1. As where the words were spoken of an attorney, "What, does he pretend to be a lawyer? He is no more a lawyer than a devil:" these words as scandalizing him in his profession, were adjudged to be actionable.



So if one says of a merchant, "He is a bankrupt" <sup>4 Co. 19. 2.</sup> knave," or "That he will be a bankrupt within two days," or such like insinuations; these words are actionable.

"And words tantamount, as conveying implied slander shall be deemed actionable."

As where the words were, "You are a sorry fellow and a rogue, and compounded your debts for five shillings in the pound:" these were held to be actionable when spoken of a trader, being tantamount to calling him *bankrupt*. <sup>Stanton v. Smith. 2 Stra. 763.</sup>

2. "When words are used to any person which are applicable to his profession or calling, and tend to scandalize it, they shall be taken as applying to it, and be actionable."

As where *Byrchley*, the plaintiff, being one of the attornies *Byrchley's case*. or clerks in court of *B. R.* and sworn to deal duly without corruption in his office, the defendant speaking of the plaintiff's manner of dealing in his profession, said to *Byrchley*, "You are well known to be a corrupt man, and deal corruptly:" these words were adjudged to be actionable, as slandering him in his profession, to which the words referred; for *sermo relatus ad personam, intelligi debet conditione personæ*, <sup>4 Co. 16.</sup>

The last species of words in themselves actionable are,

#### 4. WORDS SPOKEN IN DEROGATION OF A PERSON IN ANY OFFICE OF DIGNITY, TRUST, OR PROFIT;

As public officers, magistrates, &c, Under which head may be considered *scandalum magnatum*, or slander of peers, or other eminent persons,

1. "With regard to this head it is to be observed, that words may be actionable with regard to these, which would not be held so in the case of a common person."

As where the words were used of the Marquis of *Dorchester*, *Proby v. Marq* "My lord is no more to be valued than the dog that lies of *Dorchester*, there:" these words were held to be actionable, <sup>1 Sid. 233.</sup>

"So in the case of a common person, words imputing merely *bad inclinations*, are not actionable (*ante* 496); but it is otherwise in the case of *public persons or magistrates*."

For where the plaintiff declared, that being a *justice of the peace* and *deputy-lieutenant*, and having served as knight of the shire for the county of *Gloucester*, and intending to stand candidate for it again, the defendant said of him, "He is a Jacobite, and for bringing in the pretender and popery to destroy our nation:" these words, which only charged

charged inclinations and principles, were held to be actionable.

Aston v.  
Blagrove.  
1 Stra. 617.  
2 Lord Raym.  
1369.  
S. C.

So where the words were spoken of the plaintiff, who was a *justice of peace*, "He is a rascal, a villain, and a liar;" they were held to be actionable when applied to a person in an office of trust or dignity.

Stuckley v.  
Bulhead.  
4 Co. 16. a.

So where the words were spoken of *Stuckley*, who was a justice of peace for *Devonshire*, "*Stuckley* covereth and hideth felonies, and is not worthy to be a justice of peace;" the plaintiff recovered, for it was against his oath and office, and a good cause to put him out of the commission, and indict and fine him.

2. "But where the words do not charge the person in such trust or office, with any breach of his duty or oath, with any crime or misdemeanor, whereby he has suffered any temporal loss in fortune, office, or any way whatsoever, but are spoken as matter of opinion as to such person's conduct, such words are not actionable."

Onslow v.  
Horne.  
3 Will. 177.

As where the plaintiff being knight of the shire for the county of *Surry*, the defendant, at a meeting of the freeholders of the county, used the following words: "As to instructing Mr. *Onslow*, you might as well instruct the winds; and should he promise his assistance, I should not expect that he would give it:" these words were adjudged not to be actionable, as charging no crime, but being merely matter of opinion; and per Lord Chief Justice *De Grey*, to impute to any man the mere defect of moral virtue, moral duty, or obligation, which renders a man obnoxious, is not actionable, such as the present case, which is merely insinuating a doubt of Mr. *Onslow's* honour.

Salk. 695.

2. But a distinction is to be observed when the words are used to a person in an office of profit, and when in one of credit only: in offices of profit, words that impute either want of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute want of ability only are not actionable: as to say of a justice of peace, "He is an ass; he is a beetle-headed justice," is not actionable; and the reason is that a man cannot help his want of ability; as he may his want of honesty: but even in offices of credit, words that import corruption or dishonesty are actionable.

4. As to actions of *scandalum magnatum*, it is enacted by stat. *West.* "That if any one slander a peer, or other great person, that he shall be punished by imprisonment:" and by stat. 2. *Rich.* 2. "The person injured may in a *qui tam* action recover damages for the offence."

2. OF WORDS NOT IN THEMSELVES ACTIONABLE, BUT WHICH BECOME SO BY REASON OF SOME SPECIAL DAMAGE; AS LOSS OF PREFERMENT, MARRIAGE, &c.

1. For the Loss of Preferment.

As if a divine is to be presented to a benefice, and one to defeat him of it, says to the patron "That he is an heretic, or a bastard, or that he is excommunicated;" by which the patron refuses to present him, and he loses his preferment, he may have his action for that slander, 4 Co. 17. 2.

So where the defendant said to the plaintiff (who was son and heir of his father) "That he was a bastard;" an action was adjudged to lie, for it tended to disinheret him of the lands which would descend to him from his father: but it was further resolved, That if the defendant pretended that the plaintiff was a bastard, *and be himself the next heir*, no action lies, for it is a claim a right. *Banister v. Banister.* cit. 4 Co. 17.

"And in such case it seems not necessary that the damage arising from the words be *certain* and *immediate*, for if it be *probable* and *remote*, it will maintain the action."

As where the action was for calling the plaintiff a bastard; and it was moved in arrest of judgment, that he should shew some special damage from a present title and possession, whereas he had only declared that his grand-father was tenant in tail, and his father had divers sons living, of whom he was the youngest; but *there being a possibility that he might inherit, and be proving that he had been offered a sum of money for his possibility*, the action was adjudged to lie, *Vaughan v. Ellis.* Cro. Jac. 287.

2. For the Loss of Business or Trade.

As where the plaintiff declared that he was an innkeeper, and the defendant said to him, "Thy house is infected with the pox, and thy wife was laid of the pox;" these words were adjudged to be actionable; for it was a discredit to the plaintiff, and guests would not resort thither, *Levett's case.* Cro. Eliz. 289.

"But in such case it must appear that the words from whence the injury may arise, were *used in a conversation concerning the plaintiff's trade or business.*"

For where the plaintiff declared that he was a trader, and that the defendant said to him, "You are a cheat, and have been a cheat for divers years," judgment was arrested, after a verdict, *Savage v. Robey.* Salk. 694.

a verdict for the plaintiff, in not appearing that *there was a colloquium of the plaintiff's trade at the time.*

" Though where the words must clearly refer to the plaintiff's trade or calling, they shall be actionable though no colloquium is found."

Reeve v.  
Holgate.  
2 Lev. 62.

As where the plaintiff was a *master and dealer in corn* and the defendant said of him, " Don't deal with him, he's a cheat, and has cheated all the farmers at *Epping*, and dares not shew his face there, and now is come to cheat at *Hatfield*:" these words evidently referring to the plaintiff's trade, were held to be actionable though the special verdict which found them, found also no colloquium of the plaintiff's trade.

### 3. For Loss of Marriage.

Davis v.  
Gardiner.  
4 Co. 16. b.  
Poph. 76.  
S. C.

As where the plaintiff declared, that she being a virgin of good fame, was going to be married to one *Antony Elcock*, and that the defendant said of her, " I know *Davis's* daughter, she dwelt in *Cheapside*, and there was a grocer that did get her with child:" by reason of which words the said *Elcock* refused to marry her; the plaintiff recovered, on account of the special damage.

Holwood v.  
Hopkins.  
C19. Eliz. 787.

Graves v.  
Blanchet.  
Salk. 699.  
Id. 694. S. P.

But in this case a distinction is taken, that in order to make such words actionable, they *must be spoken to the person who was in communication to have married the person who was defamed*, for if spoken generally the action will not lie; for to call a woman whore, or words tantamount, is a *matter of spiritual cognizance*, and not actionable at common law, unless under the circumstances above. *Sed Q.*

### 4. For the Loss of Service.

Per Lord  
Mansfield.  
Bull. N. P. 8.

As if a person to prevent a servant from getting a place gives him a false character, it is actionable.

Weatherstone  
v. Hawkins.  
Hill. 26 G. 3.  
1 Term Rep.  
110.

But in such case it must appear to have been given *maliciously, and with an ill intention*; for though the character given is *false*, yet if no malice appears the action will not lie.

3. " But it is to be observed, that words in themselves actionable may nevertheless not bear an action, from the particular circumstances under which they are spoken or used."

1. *As if words are spoken out of a motive of friendship, and without intention to defame.*

As where the action was for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon," and special damage was laid in the declaration, viz. "That one *Lane* refused to trust the plaintiff for an horse:" *Lane*, the person named in the declaration, was the only witness called for the plaintiff; and it appearing from his evidence, that the words were *not spoken maliciously*, but in confidence and *out of friendship to Lane*, and *only by way of friendly warning not to trust the plaintiff for the horse*; *Pratt Chief Just.* directed the jury, That though the words were actionable, yet that if they should be of opinion that they were not spoken out of malice, but in the manner before-mentioned, that they ought to find the defendant not guilty; and they did so accordingly.

*Herver v. Dowson.*  
Sittings after  
Trin. 5 G. 3.  
Bull. N. P. 8.

2. "If they are spoken *privately, and in confidence.*"

As where a servant brought an action against her former mistress, for saying to a person who came to enquire her character, "That she was saucy and impertinent, and often lay out of her own bed, but that she was a clean girl, and did her work well:" though the plaintiff proved that she was by this means prevented from getting a place, yet *per Lord Mansfield*, this is not to be considered as an action in the common way for defamation by words, but *the gist of it must be malice*, which is not implied from the occasion of speaking, but should be directly proved: *this was a confidential declaration*, and ought not to have been disclosed.

*Edmonson v. Stephenson & ux.*  
Sittings after  
East. 6 G. 3.  
Bull. N. P. 8.

3. "If *the words have been used in the course of legal proceedings*, no action will lie for them."

As was adjudged in this case, that if *one exhibits articles of peace against any person containing divers great abuses and misdemeanors, in order to have him bound to his good behaviour*, the party accused shall not have for any matter contained in such articles any action on the case, for the person has pursued the due course of justice; and if those actions were permitted, those who have just cause of complaint would not dare to complain, for fear of vexation.

*Cutler v. Dixon.*  
Co. Rep. 146.

"But though the defendant may in such case be justified, yet if he does *not confine himself to legal form*, but charges crimes not properly cognizable by that jurisdiction to which he applies, an action will lie for those charges."

As where *Wood*, the defendant in this action, had exhibited articles in the *Star-Chamber* against Sir *R. Buckley*, and in them charged several matters not cognizable in that court, and had often declared in the country that the articles exhibited were true, it was resolved, That for any matter contained in

*Buckley v. Wood.*  
4 Co. 14. b.  
Cro. Eliz. 230.  
S. C.

in the bill which was examinable in that court, that no action lay though it was false, because it was in the course of justice: but, 2dly, That for the matters not cognizable in that court, that the action lay, as being a slander on a person which he could not defend: 3d, That though for preferring false matter to a competent jurisdiction, that no action lies, yet *that if he talks at large in the country, and avers his charges to be true, that an action lies.*

S. C. It was further held in this case, That if a witness goes beyond the point in issue, and slanders a third person, that this action lies against him.

Buller N. P. 5. *Note, That if two persons say the same words, yet a joint action of slander will not lie against them.*

## 2. OF SLANDER BY WRITING, OR LIBEL.

Under this head I shall consider, 1st, The nature of libels: 2. What constitutes the offence, and who are liable to punishment for them.

### I. OF THE NATURE OF LIBELS.

Slander by libel differs only from slander by words, that it is delivered *in writing or printing*; but the offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity from its being done premeditatedly.

The rules, therefore, before laid down in respect to slander by words, will be found to apply equally in the case of libels: which I shall first consider: and secondly, The more particular nature of libels themselves.

As, 1st, "To charge a person with any crime which may subject him to the danger of legal punishment, is a libel, and actionable."

Buller N. P. 9. As to charge a person with Sodomitical practices.

2. "To alledge any matter which may be the means of excluding him from society."

Villers v.  
Monsby.  
2 Will. 403.

As where the plaintiff brought his action against the defendant for, a libel, charging him, in a ludicrous copy of verses, *with having the itch, and stinking of brimstone*; the plaintiff recovered in this action, the words charging him with diseases which rendered him unfit for society.

3. "So where the writing is such as *will injure a man in his trade or profession*, it is a libel for which this action lies."

As

As where the plaintiff declared, that he was gun-maker to the Prince of *Wales*, and it having been inserted in the newspapers that he had presented a gun to the Prince of *Wales* two feet six inches long, which would carry as far as one a foot longer; the defendant intending to injure him in his trade, had published another paragraph in the newspapers, mentioning this circumstance, and adding, "That he advised all gentlemen to be cautious of dealing with him, as he would not engage with any artist in town, nor did ever make such experiment (except out of a leather gun) as any gentleman might be satisfied at the *Cross-guns, Long-Acre*:" this advertisement tending to injure the plaintiff's reputation as an artist, was adjudged to be actionable, though it was agreed, that for one tradesman to pretend to more skill than another, would not be so.

Harman v. Delany.  
2 Stra. 898.  
Fitzgib. 121.  
8. C.

4. "So where the writing injures the domestic peace and happiness of a family, charging a man's children with immorality or incontinence." As here writing a song and singing it about the town, that the prosecutor's daughter was of loose manners, and had gone up to *London* to be delivered of a bastard: this action was held to lie.

Rex v. Benfield, & Saunders.  
2 Burr. 980.

5. "But nothing shall be construed a libel which is necessary in the course of legal proceedings, and is relevant to the matter which is before the court."

As where the plaintiff declared, "That he being a doctor of laws, and vicar general to the Bishop of *Lincoln*, that the defendant had presented, and caused to be printed a petition to parliament, charging him with divers crimes; as extortion, oppression, and corruption in his office:" the action was held not to lie, the petition being the necessary and usual mode of complaint to parliament for any redress of grievance.

Lake v. King.  
1 Saund. 331.

So where the action was brought for a libel, and the offence as laid was, "That the defendant in a certain affidavit before the court, had said that the plaintiff in a former affidavit against the defendant had sworn falsely:" the court held that the action would not lie; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceedings, that no action would lie for it.

Afley Bart. v. Younge.  
2 Burr. 817.

6. "So no matter which is stated in any memorial or petition for the redress of grievances, and addressed in the proper channel, by which such redress may be had; that is, to the persons

"persons

" persons only who have power to give such redress, shall be deemed libellous."

*Rex v. Baillie.*  
Mich. 20 G. 3.  
B. R. MSS.

As where the defendant being deputy governor of *Grasswich Hospital*, wrote a large volume, of which he also printed several copies, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, and Lord *Sandwich* in particular, who was then first lord of the *Admiralty*, with much asperity: he distributed the copies to the governors of the hospital only, but it did not appear that he had given a copy to any other person: on a rule for information for this as a libel, Lord *Mansfield* held, That this distribution of the copies to the persons only, who were from their situation called on to redress the grievances, and had from their situation power to do it, was not a publication sufficient to make that a libel; and he seemed to think that, whether the paper was printed or in manuscript, under these circumstances, made no difference.

" As words spoken without an intention to be made public, as in confidence or privately, are not actionable."

*Peacock v. Reynell.*  
2 Brownl. 151.

So if a person in a private letter expostulates with another on his vices, it is no libel which is actionable.

*Casse de Libellis Famosis.*  
5 Co. 125.

And note, That a libel against a magistrate is a higher offence than against a private person, for it is a scandal upon government.

*Halliwood's case cited.*  
5 Co. 125. b.

Therefore, if one finds a libel against a private person, he ought to destroy it, or to bring it to a magistrate; but if it is against a public person, he ought to bring it to a magistrate, that the offender may be found out.

## 2. As to the more particular Nature of Libels.

*Hurt's case.*  
Trin. 12 Ann.  
1 Hawk. P. C.  
124.  
2 Atk. 470.  
S. P.

1. A defamatory writing, expressing only the initials, or one or two letters of a person's name, but in such a manner as obviously, and indubitably referring to the person, and so that it would be nonsense if strained to any other meaning, is as properly a libel as if the whole name had been mentioned at large, for it would bring the utmost contempt on the law to suffer its justice to be eluded by such trifling evasions, and that a writing understood by the meanest capacity could not be so by the judge and jury.

" A writing, though with feigned names, has been considered a libel."

Per Lord  
Hardwicke.  
1 Atk. 470.

As was the case of Mrs. *Dodd*, who printed a letter abusing the late king, under the title of *Merriweis, Sophi of Persia*: though



though the whole letter was so couched in feigned names, yet the jury found the publisher guilty.

3. "A writing, though not directly charging crimes, may be a libel, as if done in a taunting or ironical manner."

As after recounting any acts of public charity by the person to say, "You will not play the *Jew* or hypocrite," and so go on in a strain of ridicule, to insinuate that what he did proceeded from vain glory. Hick's case.  
Hob. 215.  
Poph. 139. S. C.

4. It is not material whether the libel be *true* or *false*, or whether the party against whom it is levelled is *of good or evil fame*; for the party grieved ought to complain for every injury done to him to the ordinary course of law, and not to have recourse to methods of redress by slanderous publications. Cafe de Libel.  
Famof.  
5 Co. 125. b.  
4 Ref.

5. A writing may be a libel, though the person libelled is *dead*; for it stirs up some of the person's family to revenge this attack on his memory; and if he was a magistrate who is *dead* who has been slandered, it is punishable as a slander on the government. Cafe de Libel.  
Famof.  
5 Co. 125.  
2 Ref.

And where there is an information or indictment for a libel reflecting on the memory of any person deceased, the information or indictment should state "That it was done with a design to bring the family of the deceased into contempt, to stir up the hatred of the king's subjects against them, and excite the relations to break the peace by vindicating the honour of the family;" and therefore where the indictment only stated, "That the words as set forth 'were to the great scandal and disgrace of the memory, reputation, and character of G. Earl Cowper, in contempt, &c. to the evil example, &c. and against the peace, &c.'" the judgment was arrested; for offences of this nature are punished by law, as tending to a breach of the peace, by provoking the friends of the deceased to acts of violence and revenge. Rex v Topham.  
4 Term Rep.  
126.

For it is necessary to be observed, that libels are punishable by *information* and *indictment*, as well as by *action*; that is, considering them as an offence against the public peace and good order of the state; and thereon is founded the distinction, that if any person is slandered by libel, *he* may have his *action* as well as an information or indictment; but a libel reflecting on a person dead, or the conduct of the king's ministers or government, *without any particular application*, is punishable only by *information* or *indictment*, as a matter of public, not of individual concern.

Rex v. Horne.  
Cowp. 672.

As was the case here of an information against the defendant, "For publishing an advertisement, suggesting that many of his majesty's subjects had been murdered by his majesty's troops in *America*, and proposing a subscription for raising a sum of money for the support of their wives and children," the people of *America* then being in open rebellion to this country; the defendant was found guilty, fined, and imprisoned.

"And on the same grounds, though the writing may not convey any slander against *any person*, yet may it be a libel, from having an *evil public tendency to corrupt the manners of the people*."

Rex v. Carl.  
2 Stra. 788.  
Rex v. Hill.  
Ibid. cit.

As in this case, where an infamous and obscene book, which had been published by the defendant, was, on an information, and on solemn argument, adjudged to be a libel; and he was convicted, and stood in the pillory.

"So for the same reason, publications levelled against the *established religion* have been held to be libels."

Rex v. Woolston.  
2 Stra. 834.  
Fitzgib. 65.  
S. C.

As where the defendant was convicted of having published four blasphemous discourses on the miracles of our Saviour, and attempting to move in arrest of judgment, the court said they would not suffer it to be debated, whether to write against Christianity was not an offence punishable in the temporal courts at common law.

Regina v. Bedford.  
Mich. 12 Ann.  
cit. 2 Stra. 789.

And on the similar principles of public concern, a *treatise of hereditary right* was held to be a libel, though it contained no libel upon any part of the then subsisting government.

"And in like manner, any public reflection on the *administration of justice* is libellous."

Rex v. Watson,  
& al.  
Hil. 28 G. 3.  
2 Term Rep.  
199.

As where one *Hurry* having been maliciously prosecuted for perjury by the defendant *Watson*, and acquitted; and having afterwards recovered large damages for the malicious prosecution from him, the corporation of *Yarmouth*, of which he was a member, made an order in their books, voting to him 2,300*l.* in consideration of the verdict against him, and declaring that it was done in consideration of his being actuated by motives of public justice, and preserving the rights of the corporation, and supporting the honour and credit of the chief magistrate: the court held this to be a libel on their proceedings and the administration of justice, and made a rule absolute for an information against the defendants.

6. "Censures passed by sectaries against any of their body, for non-observance of the rules and ordinances of their sect, shall not be deemed libels."

For

For where the prosecutrix was a *Quaker*, who being less rigid than the rest of the sect, the brethren first admonished her, then sent deputies to her; and lastly, expelled her, and entered as a reason in their books, "for not practising the duties of self-denial:" the court were of opinion, That this was merely a piece of discipline, and therefore not a libel. Rex v. Hart.  
1 Black. Rep.  
386.  
Po8. 312.

Though these cases on *indictments* and *informations* for libels do not properly belong to this Treatise, yet being necessary to the clear understanding of the doctrine under this head, I have thought it not improper to insert those now mentioned, and the other cases on the same head, premising those cases on the rules adopted by the court in granting informations.

As, 1st, It is a general rule that the court will not grant an information for a private libel, charging any person with an offence, unless such person *will deny the charge upon oath*. Rex v. Miles.  
Douglas 276.

For if the party admits the libel to be true, or does not deny it, though being true does not excuse the libel, yet it is sufficient to induce the court to leave the party to his remedy by *indictment*. Rex v. Bickerton.  
1 Stra. 498.

But to this, certain exemptions have been admitted: 1. Where the libel is founded on charging the prosecutor with *words delivered in parliament*, for such cannot be questioned (*Bill of Rights, 1 W. & M. sect. 2. c. 2. art. 9.*): 2dly, Where that charge is only general: 3dly, Where the party libelled is at such a distance that he cannot be had to swear when the information is moved for by a person on his behalf. Rex v. Haswell  
& Bate.  
Dougl. 572.

And *Note*, That what is or is not a libel, is *matter of law* upon the face of the record: on which after conviction the defendant may move in arrest of judgment, if the paper is *not a libel*. Per Lord Mansfield.  
5 Burr. 2666.

#### b. WHEREIN THE OFFENCE OF LIBELS CONSISTS, AND WHO ARE LIABLE TO PUNISHMENT FOR THEM.

1. "As the offence of a libel consists in being the means of propagating slander, it is essential to a libel *that it be published.*"

For in an information for a libel in this case, it was held, That copies of a libel being found in the defendant's chamber, Rex v. Fitter  
and Carr.  
2 Kcb. 502.

ber, was no publication or offence, *without discoursing of it, or delivering it out.*

John Lamb's  
case.  
9 Co. 59. b.

So on an information for a libel in this case, it was resolved, That every one who shall be convicted of a libel ought to be a contriver of it, or a procurer of contriving it, or a malicious publisher of it, knowing it to be a libel; for if one reads a libel, or hears it read, it is no publication; as before he reads it or hears it, he cannot know that it is a libel; but if after hearing or reading it, he repeats any part of it to others, or reads it to them, it is a publication of it; but if he writes a copy of it, and does not publish it to others, it is no publication of it; but this might be evidence rather against him, unless he delivered the copy to a magistrate.

" But *writing* a libel seems to be sufficient, though the person was not concerned in the publication."

Rex v. Paine.  
Carth. 405.  
5 Mod. 163.  
S. C.

For where in this case the jury found, that the defendant did *write* the libel, but that it was dictated to him by a person unknown to him and to the jury, and that the stranger dictated the whole of the subject matter which the defendant wrote, the court held the defendant to be guilty, the writing being the essential part, a *making* of the libel, and so different from *transcribing* of it, as in the last case, which is not of itself an offence.

Rex v. Almon.  
5 Burr. 2687.

2. Proof of the sale of a libel in the shop of a printer, is *prima facie* evidence to convict the owner of the shop of having published the libel, and must stand till contradicted, explained, or exculpated by contrary evidence; and though the copies have been sold by his servant without his knowledge, and he afterwards stops the sale, this can only be offered in mitigation of punishment.

Rex v. Middleton.  
1 Stra. 77.

3. If a man sends a libel to *London* to be published, it is his act in *London* if the publication be there.

Casse de Famosis  
Libellis.  
5 Co. 135.

4. And as to the *mode of publishing* a libel, it is resolved, That it may be published, 1. *Traditione*, or by handing about copies of it: 2. *Verbis aut cantilenis*, reading or singing it in the presence of others.

Hick's case.  
Poph. 139.

Writing a letter addressed only to the party libelled, is a sufficient publication *on which to ground an information or indictment*; for it tends to excite the party to break the peace, by avenging the insult or reproach.

Want's case.  
Moor's 127.  
Rex v. Benfield  
& al.  
2 Burr 2666.

But repeating part of a libel in merriment without malice, has been held not to be a publishing: but singing a song in ridicule, or slandering the person's character, was in this case deemed a sufficient publication.

As where in the case of *Rex v. Hart* (*ante* 509) the sect of *Quakers* had expelled one of their members; and having entered in their book the reason for such expulsion, "That it was for not practising the duty of self-denial;" and she sent her maid for a copy of the entry, which was delivered to her by the defendant, who was clerk of the meeting; and this was the only publication proved; the court seemed to be of opinion that it was insufficient.

3d. The third species of Slander is called

#### LIBEL SINE SCRIPTIS:

As by pictures, raising a gallows before a man's door; and *s Co. 125*: hanging him in effigy, and such like:

But as to signs and pictures, it seems necessary to shew by *3 Black. Com. 125*: proper innuendos and averments the defendant's meaning, that they are particularly applied to the plaintiff, and that some special damage has followed:

### 2. OF THE RULES OF CONSTRUCTION ADOPTED BY THE COURT IN CASE OF SLANDEROUS WORDS.

The old rule in the construction of words was, that they were always to be taken in *mitiori sensu*; but this is now exploded, and the rule is, that they *shall be taken in that sense in which they would be understood by those who hear or read them.* *Bradley v. Meffon. Mich. 10 G. 2. Ball. N. P. 4.*

But many former rules of construction agree with this; as,

1. "That *all the sentence is to be taken together*; for though part of the words may be actionable, yet they may be so explained by the rest, as not to bear an action."

As where the words were, "*Brittridge is a perjured old knave*; and that appears from a stake, parting the grounds of *1. Martin and Mr. Wright.*" After a verdict for the plaintiff, judgment was arrested; for though the first words "*perjured old knave*" are actionable, yet it must be perjury in a court of justice which is actionable; but here the subsequent words explain the words clearly not to mean judicial perjury; and the whole context when taken together is not actionable. *Brittridge's case. 4 Co. 19.*

2. "Where words are spoken which bear an imputation of slander, or with an intention to defame, the court will not strain to find an innocent meaning for them."

Ward v.  
Reynolds.  
Gill. Rep. 243.

As where the defendant said to the plaintiff, "How did your husband die?" Plaintiff answered, "As you may, if it please God." The defendant replied, "No, he died of a wound you gave him." On *not guilty* pleaded, the plaintiff had a verdict, when it was moved in arrest of judgment, that the words might have an innocent meaning, as that the stroke might have been given *by accident*; but the court said, That the words bore a scandalous meaning, and that they would not endeavour to find out how they might be spoken with an innocent meaning.

"So, on the other hand, they will not put a forced construction of guilt on words which may bear an innocent meaning."

Box v. Burnaby.  
Hob. 116.

As where the words were of an attorney, "He is a common maintainer of suits." They were held not to be actionable, for to maintain suits is his business; and the words shall not be construed to import a charge of *maintenance* when applied to him.

3. "The words should import a *direct charge* of a scandalous nature, not by inference or conclusion, or the court will not hold them to be actionable."

Stanhope v.  
Blith.  
4 Co. 15. a.

As where the words were, "*M. Stanhope* hath but one manor, and that he got by swearing and forswearing." The words were adjudged not to be actionable: 1. Because they were too general. 2. Because they did not charge the plaintiff himself with swearing and forswearing; for he might have got the manor so, and yet not be privy to the swearing or forswearing.

"Therefore the *person slandered* must always be *certain*, so that there can be no doubt as to the person meant."

4 Co. 17. b.

As if one was to say, "One of the servants of *J. S.* (he having many) is a notorious felon or traitor;" no action lies, on account of the uncertainty of the person: but if the person is once named, as if after conversing about *J. S.* one says, "He is a notorious thief;" this is actionable, for the person meant may be sufficiently ascertained by the innuendo, which in the former case could not be done.

4. "Where words are used with an intention to slander though the *offence which the defendant intended to lay to the plaintiff's charge* is *improperly expressed*, yet may the words be actionable."

As where the defendant said of the plaintiff, "*Twaites* has hired several persons to make false powers, to receive seamen's wages." This was construed to convey a charge of *forgery*, and to be actionable, though the word *powers* is general, and may not properly mean *letters of attorney*; yet being so used in common speech, it shall be construed as intending to do *fame*. Twaites v. Shaw.  
Gilb. Rep. 216.

### 3. OF THE PLEADINGS.

#### I. THOSE ON THE PART OF THE PLAINTIFF.

1. "Where the words or sentence does not of *itself* contain a charge of a slanderous nature without words of *reference*, or *explanatory of the meaning or application*, it may be supplied by proper *innuendos* in the declaration, as to matters or persons referred to."

"But as to how far the *innuendos* are to be allowed, it has been resolved,"

1. "The office of the *innuendo* being to supply the absence of something necessary to complete the sentence, and shew the application of the words, it can never be admitted to extend their meaning beyond the import of the words themselves."

For where the words were "*Master Barham* did burn my barn," with an *innuendo*, *a barn full of corn* (which is felony if there is corn in it, or it be parcel of the dwelling-house); the court would not suffer the *innuendo* to imply that there was corn in it, when the word would not of itself bear so extensive a meaning. Barham's case.  
4 Co. 20. a.  
Castlem v. Hobbs.  
Cro. Eliz. 428.  
S. P.

2. "So where the *person* is uncertain, an *innuendo* shall not make him certain."

As if one says "I know one near or about *J. S.* who is a notorious thief;" the person really meant cannot be supplied by an *innuendo*, when there has been no conversation about him; for the office of the *innuendo* is to contain and design the person who was named in certain before, and stands in the place of a *prædict*: and therefore without something to refer to, cannot be made certain; for it would be inconvenient that actions might be maintained by imagination of an intent, which does not appear by the words on which the action is founded; but which is uncertain, and subject to deceivable conjecture. 4 Co. 27. b.

3. "So neither shall the words if used generally be extended by the innuendo in the declaration to apply to any particular thing, so as to induce guilt from thence."

Thomas v.  
Axworth.  
Hob. 2.  
Hervy v.  
Duckins.  
Hob. 45. S. P.

As where the words were "He forged a warrant" *innuendo*, a certain warrant, by which the sheriff was commanded to take *Margaret Hogg, &c.* it was held that the innuendo could not specify in such manner that which was generally alledged.

2. "The next part of the declaration material to the action is the *averment*. This is where the words for which the action or information is brought are only criminal by reference to some other fact, which therefore constitutes the ground of the action, or is necessary to maintain it; in such case this matter must be expressly averred in the declaration."

As in the case of *traders*, certain words are actionable applied to them, which are not so when used to others; as to call one a bankrupt, &c. In such case it is necessary to aver a *colloquium* concerning such a person as a *trader*, and that the words were used with that application.

Bland's case.  
Hob. 309.

So where the plaintiff brought an action, for the defendant's having said, "That he was indicted for felony at a *sessions* holden, &c." but did not aver that he had not been indicted; after a verdict for the plaintiff, judgment was arrested for want of this averment; for if he was not indicted, there was no crime.

Lowfield v.  
Bancroft.  
2 Stra. 934.

In like manner in the case of *libels*, the same averments are necessary; and in this case judgment was arrested, because it was not laid that the libel was *of and concerning the plaintiff*.

Rex v. Alderton.  
Sayer's Rep.  
280.

So where the libel was an advertisement, reciting certain orders, made for collecting money on account of the distemper among the horned cattle in *Suffolk*, and it charged that the money so collected had been improperly applied, and the information charged this to be a libel on the justices of *Suffolk*; but in the body of the libel no mention was made of the justices of *Suffolk*, nor did the information, in the introductory part, say that it was a libel *of and concerning them*; and though in the body of the information when any order was mentioned, there was an *innuendo*, that it was an order of the justices of *Suffolk*: but judgment was arrested for want of the averment, the innuendos not explaining sufficiently the matter, there being nothing to refer to.



But where the information was for a libel, "*of and concerning the king's government*"; these words were adjudged to be a sufficient introductory averment to support the information by reference of the subsequent matter to them. *Rex v. Horne. Cowp. 672.*

"But where the words charge a crime, which words are *of themselves actionable*, it seems that in such case, an averment that the crime was not committed, is not necessary."

As where the words were, "I will call him in question for poisoning my aunt; and I make no doubt to prove it." After verdict for the plaintiff, it was moved in arrest of judgment, That it was not averred, that in fact the defendant's aunt was poisoned: but *curia contra*, for the plaintiff's character is impeached though he never did such a fact. *Webb v. Poer. Cro. Eliz. 569.*

3. In an action by a trader for actionable words, as for calling him *bankrupt*, for example, the declaration should state "That he was a trader, and used the trade of, &c." for where in this case the plaintiff only declared that he used the *art and mystery* of a baker, judgment was arrested, as it might be only for the use of his own family. *Hawkins v. Cutts. Hutt. 49.*

So he should also state in his declaration, "That *he gained his living* by buying and selling;" for in this case, for want of such averment, judgment was arrested: for such traders only are within the bankrupt laws. *Emerson v. Sid. 299.*

So the declaration should state, "That *at the time of the words spoken* he was a trader."

For where in this case the plaintiff only declared, That he was of good fame, *& per multos annos retroactos*, was a merchant, &c." the court inclined to think the declaration ill, as the words did not sufficiently shew that he was then a merchant, as he might have been so for many years past, but had left off trade. *Dotter v. Ford. Cro. Eliz. 794.*

And these several matters must be proved at the trial.

4. If an action is brought for calling the plaintiff's wife a *whore*, *per quod* *J. S.* left off coming to the house, the special damage being the gift of the action, which is the husband's only, it ought not to be laid *ad damnum ipsum*: But where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives. *Coleman & ux. v. Harcourt. 1 Lev. 140. Grove et ux. v. Hart. Trin. 25 G. 2. Buller N. P. 7.*

And note, That saying generally *per quod* several persons left the house, without naming any in particular, is not special damage, *Ibid.*

Regina v.  
Drake.  
Salk. 660.

5. In setting out the words, or the tenor of words, in the declaration in this action, there is a difference between words spoken and words written. Of words spoken there cannot be a tenor, for there is no original to compare them to, as in the case of words written; therefore in the declaration for words spoken, variance in the omission or addition of a word is not material, it is sufficient if so many be proved and found as are actionable. But it is otherwise in the case of words written; for though in describing a libel, or other writing, there are two ways of pleading, either by the words, saying *cujus tenor sequitur*, or in *hæc verba*, &c. or by the sense; if you declare on the words themselves, any variance or mistake is fatal, for *tenor* means a transcript or true copy: but in declaring on the sense, such an adherence is not required, and a variance is not fatal.

Id.

Therefore where the declaration was for a libel *secundum tenorem sequentem*, and in setting out the sentence, *nor* was inserted for *not*; though the sense remained the same, the variance was held to be fatal.

6. "As it is essential to a libel that it be published, it is therefore necessary that *that* should appear from the declaration; but the word *published* is not essential, nor is there any technical form of words necessary, if it appears by any means either from the particular case, or in any manner that the libel was published."

Baldwin v. Elphinstone, in Excheq. Chamb.  
2 Black. Rep.  
1037.

As where the count in the declaration was "*for printing, or causing to be printed, a libel against the defendant in error, in a newspaper*," and the error assigned was the want of the averment of publication; the court held, That the fact of printing a libel, though it might be an innocent act, yet unless qualified by circumstances, should *prima facie* be understood to be a publishing, as it must be delivered to the compositor, workmen, &c. but printing in a newspaper admits of no doubt on the face of it, and shall be intended to be a publication, unless the defendant shall shew that it was suppressed and never published: the court therefore gave judgment for the defendant in error.

Carpenter v. Farrant.  
Mich. 10 G. 2.  
B. R.  
Bull. N. P. 8.

7. The plaintiff need not in his declaration aver, "That the words or charge was *not true*," for that is supplied by the general allegation in the declaration, that the defendant published them *falsely and maliciously*.

Pinkney v. Collins.  
4 Term Rep.  
571.  
Clifford v. Clifford.  
1 Term Rep.  
647.

8. "Where the libel has been published in different counties, the court will not change the venue into any one of them, as where it is published in a newspaper which circulates into many places;" for the defendant cannot say in his affidavit, "That the cause of action arose in such a county, and not elsewhere."

But

But where the libel was in a letter, written from a place in the county to which it was moved to change the venue to another place in the same county, there the court changed the venue; for the cause of action arose in that county only. Freeman v. Norris. 3 Term Rep. 306

So where the libel was a letter written in *Yorkshire* to a person in *Germany*, the court changed the venue to *Yorkshire*; for the only part of the transaction, out of which the cause of action arose, which happened in *England*, was in *Yorkshire*, though the actual publication was in *Germany*. Metcalf v. Markham. 3 Term Rep. 652

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. The general issue in this action is *not guilty*, or a denial that the defendant spoke the words in question; or if spoken, that they were not actionable.

2. Several special pleas in justification are good, which admit the fact, but deny the slander or defamatory intention.

As the defendant may plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question; so that he may justify the speaking them through concern, or the reading them as a story out of an history; or he may shew from the dialogue that they were spoken in a sense not defamatory; or he may give these matters in evidence on the general issue, for they prove him not guilty of the words maliciously. Brook v. Montague. Cro. Jac. 91.

“ And the defendant may justify by shewing the application of the words used, not to be slanderous, though they would otherwise import slander.”

As where they were for calling the plaintiff “murderer,” the defendant may shew that it was in a conversation concerning the killing of hares, of which the plaintiff having said that he had killed so many, that the defendant then said he was a murderer; but meant of hares. 4 Co. 13 b. 14 a.

“ But it is no justification of slanderous words that the defendant heard them from another person if he repeated them; for every one is answerable for the slander which he himself propagates of another.”

As where this action was brought by the captain of a ship against a merchant of *Bristol*, for saying that his vessel was seized, and he put into prison at ———, for smuggling corn: Ch. Just. Lee held, That proof of the defendant's having heard it read out of a letter, and that he only reported the story, was no justification; but that he was answerable for the Anon. G. Hall. 1752. Bull. N. P. 10.

the reports which he propagated; and the jury gave 500l. damages.

Powell v.  
Plunkett.  
Cro. Car. 38.

So it is no justification of slanderous words, that the defendant, *suspecting* the plaintiff to have been guilty of the fact concerning which the words were spoken, had so used them concerning him.

5 Co. 125.  
Doug. 373.

3. "The defendant may plead that the *words were true*; for if so, it is *damnum absque injuria*: and the truth of the "words must always be *pleaded*."

Underwood v.  
Parks.  
2 Str. 1200.

For where in an action for words the defendant *pleaded not guilty*, and offered to prove *the words to be true* in mitigation of damages, the chief justice refused to permit him, saying that the judges had then come to a resolution *never to permit the truth of the words to be given in evidence under the general issue*, but that it should always be pleaded; whereby the plaintiff might be prepared to defend himself, as well as prepare to prove the speaking of the words.

"But if the plaintiff after proving the words laid, goes into evidence of other words, which shew the defendant's ill-will to him, the defendant shall be allowed to give the truth of these words in evidence."

Collison v.  
Loder at Ox-  
ford, 1750.  
Bull. N. P.

As where the plaintiff brought an action against the defendant for saying "He was a buggerer, and that he caught him in the fact." After proving the words, the plaintiff gave in evidence, that at another time the defendant had said, "That he was guilty of Sodomitical practices." *Just. Burnet* permitted the defendant to give the truth of these words in evidence; for the action not being brought for the speaking of them, the defendant had no opportunity of pleading that they were true; and being given in evidence in aggravation, the defendant ought to be permitted to shew that they were true in mitigation.

Hob. 253.

In the case of a libel where the *proceeding is by action*, the defendant may *plead that the words were true*: *aliter* where the proceeding is by information or indictment.

And where the libel contains a charge of fraud or crimes against the plaintiff, the pleas should state what cases of fraud or crime the defendant means to rely on, for so only can the plaintiff be prepared to meet them with evidence.

1 Anson v.  
Stewart.  
1 Term Rep.  
748.

As where the libel was for publishing of the defendant in the newspaper, "That he was at the head of a gang of swindlers," and the defendant pleaded the truth of the words generally; it was resolved on demurrer, That the defendant should have stated the particular instances of swindling and fraud on which he meant to rely.

4. "A Recovery of Damages in a former Action for the same Words, is a good plea in bar."

And where a person has once recovered damages in an action Per Cur. for words, he cannot afterwards have another action *on account of special damage*; as the loss of preferment, &c. which may afterwards arise in consequence of the words. Caf. K. B. 544.

Neither shall the plaintiff by any variation, omission, alteration, or explanation, be allowed to vary the words, so as to sustain another action; but the former recovery shall be held a sufficient bar. Gardiner v. Helwia. 3 Lev. 248.

5. "Another good plea in this action is *accord and satisfaction*."

"But this must be executed, and a valuable consideration in law,

For where to an action for words, the defendant pleaded an agreement between him and the plaintiff, *that the plaintiff having done a trespass, that it was agreed that one action should be set against another*. On demurrer, the plea was ruled to be a bad one. Davis v. Ockham. Style 245.

So where to a like action the defendant pleaded an agreement between him and the plaintiff, that he should confess the wrong, and ask the plaintiff's pardon on his knees; it was adjudged to be an insufficient plea, for the consideration was of no value in law. Covill v. Geoffrey. 2 Rep. 96.

6. The *statute of limitations* is another plea in bar: as to which it is enacted by stat. 21 Jac. 1. c. 16. "That actions for words must be commenced within *two years* after the words have been spoken."

Upon this statute it has been held,

Litt. Rep. 342.

1. That it extends not to actions for *scandalum magnatum*.

2. Neither does it extend to cases in which the *special damage* is the gist of the action; according to this distinction, viz. where the words are themselves actionable, there the damages shall be held to refer to the words themselves, and not to any special damage; and in such case the statute is a good bar. But where the words are not actionable without special damage, here the statute of limitations is no bar, for the action is for the special damage arising from the words, not for the words themselves. Saunders v. Edwards. 1 Sid. 95.

3. This action extends not to *slander of title*, for that is properly slander, but a cause of damage, and the slander intended by the statute is of the person. Law v. Harwood. Cro. Car. 141.

## OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

*Geare v. Britton.* 1. Though the words are in themselves actionable, the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration: but after he has proved the words as laid, he may give evidence of other expressions used by the defendant as a proof of his ill-will towards him.

Per Lee Ch.  
Just. Mich.  
1746.  
Bull. N. P. 7.

*Snellger v. Shelley.* As where in an action for words which were proved, the plaintiff's counsel offered evidence of the same words spoken on days subsequent to that laid in the declaration: It was objected for the defendant that this could not be done, because the plaintiff might have brought another action for them, and words actionable in themselves could not be given in evidence in aggravation of damages. Mr. Just. Nares agreed that different words, actionable in themselves, could not be given in evidence by way of aggravation; but that the same words might, though spoken at different days. He said this had been the practice, and with good reason; for an action for words spoken but once, would in most cases be deemed frivolous, as they might so be spoken in a heat; and therefore a plaintiff is often under the necessity of proving the slander repeated, in order to shew that it was malicious.

Somerlet Sum.  
Aff. 1780.  
MSS.

So in such case of words actionable, whatever special damage is laid the plaintiff may go into evidence of it, but not more: As where the words were, "You are a thief, and I'll prove you so," with a *per quod*, that by reason of them one John Merry, and divers others, left off dealing with him; the chief justice allowed the plaintiff to go into evidence as to Merry, but not as to the rest.

Per Lord Raymond.  
*Browning v. Newman.*  
1 Stra. 666.

2. But if plaintiff declares for words not actionable, and lays special damage; if the plaintiff does not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gift of the action. But where the words are themselves actionable, and special damage is also laid; if the words be proved, the jury must find for the plaintiff, though the special damage is not proved.

*Grest v. Loyd.*  
Bull. N. P. 6.

In the case of *Browning v. Newman* (*supra*) it is said, that where the words were not in themselves actionable, but the special damage is the gift of the action, plaintiff may go into evidence of particular damages not specified in the declaration. But J. Buller makes a *quære* if it is supported by modern practice?

But

But in general where special damage is laid, the evidence must correspond with it. As where the special damage laid was, loss of marriage with *J. N.* Lord *Holt* refused to let plaintiff go into evidence of loss of marriage with any body but *J. N.* Anon. 2 Ld. Raym. 1007.

3. "It was formerly holden, That the plaintiff was obliged to prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient to prove the *substance* of them; But the sense as well as manner of speaking them must be the same." 2 Roll. Ab. 718. Bull. N. P. 5.

As where the words were laid in the third person, "*He Avarillo v. deserves to be hanged for a note he forged on A.*" Proof that the words were used in the second person, "*You deserve, &c.*" was held not to support the declaration; for there is a difference between words spoken in a passion to a man's face, and spoken deliberately behind his back, the first being more excusable. Rogers. G. Hall. Sittings Trin. 1773 before Ld. Mansfield. Bull. N. P. 5.

So in an indictment, the words were laid to be spoken of a justice of peace in the execution of his office: at the trial, the justice was the prosecutor, and proved the words spoken, but that they were spoken to him. It was admitted that this was such a variance, that the defendant must be acquitted. Rex v. Berry. 4 Term Rep. 217.

4. If a colloquium is necessary to support the action, (as in *Salk. 694.* the case of words applied to a trader) it must be proved; and for that fault in this case judgment was arrested.

So it has been held, That if the words are laid to have been spoken at a particular place, the place not being laid as a venue, but as a description of the offence, that it ought to be proved. *Sed quare.* Per Just. Denham, at Stafford. 1729. Bull. N. P. 5.

As in the case of a justification, which if it be local; as where the words were, "That plaintiff stole plate at *Oxford*," it seems that the trial ought regularly to be there; but this would be cured by a verdict. Jennings v. Hankin. 2 Lev. 121. Craft v. Borlase. Saund. 247.

5. "Where the words are actionable, as referring to the person's profession or business, though it must be proved that the plaintiff was of the business or profession laid in the declaration; yet it seems sufficient to prove him so by reputation."

As where the action was by an attorney, charging him with swindling a person out of a sum of money, by whom he had Berryman v. Wife. 4 Term Rep. 366.

had been employed in a certain suit, and threatening to have him struck off the roll: the plaintiff proved the words, and also his having been employed as attorney in that and several other suits. It was objected for the defendant, that the plaintiff should have proved that he was an attorney, *by producing a copy of the roll of attornies*; but the judge was of opinion that the evidence offered was sufficient; and on a motion for a new trial the court concurred with the judge.

*Rex v. Topham.* 6. In an information, indictment, or action for a libel published in a newspaper, proof that the defendant gave bond at the Stamp Office for the duties on advertisements published in that paper, and had occasionally applied there respecting it, is evidence sufficient to fix him as publisher.

*Rex v. Hall.* 7. In an information for a libel, the witness for the prosecution proved, that it was shewn to the defendant, who confessed that he was the author, *errors excepted*: it was objected that this confession, not being absolute in fact amounted to a denial that that was the very book charged, and so could not be given in evidence; but the chief justice admitted it, saying, that he would put the defendant upon proving that there were material variances.

#### 4. OF THE VERDICT, JUDGMENT, AND COSTS.

##### I. AS TO THE VERDICT AND JUDGMENT,

1. "Though all the actionable words laid in any one count of the declaration be not proved, yet *if any actionable words are proved*, damages shall be given for those."

*Compagnon v. Martyn.*  
2 Black. Rep. 790.  
& Cas. ibid.  
Som. Term  
Aff. 1780.  
M88.

As where the words were, "I have been to *Newgate* to see a poor young fellow, who is going to be wrongfully transported by a very base woman (innuendo, the plaintiff's wife); she got a person to arrest him falsely for a debt of 10*l.* and was not content with that, but she afterwards swore a false debt against him for 100*l.* and has sworn a robbery against him, and transported him falsely." The defendant pleaded the general issue, and at the trial all the words were proved, except as to the words, "*she swore a false debt.*" The chief justice directed the jury not to give damages for the words not proved, but to give them for the rest; and they did so. On a motion to set aside the verdict, the court held the judge's direction to be right.



2. In an action for words where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and the jury find a general verdict, if there was any evidence which applied to the bad counts, it being impossible to say how the jury apportioned the damages to the counts, and which they found; there the court will grant a *venire facias de novo*: but where the evidence applied at the trial only to the good counts, there a general verdict may be altered from the judge's notes.

Auger v. Wilkins. Barnes 478. Per Justice Buller. Dougl. 362.

But if these words are in one count only, the court will intend that such as were not actionable were only added to shew the malice of the party, and that the damages only were given for such as were actionable.

In Osborne's case. 10 Co. 130, b.

But if the jury find a general verdict *on particular counts*, and damages entire, and any of them is bad, the judgment in that case shall be arrested.

Onflow v. Horne. 3 Will. 177.

## 2. As to the *Costs* in this action,

It is enacted by stat. 21 Jac. I. c. 16. "That in actions for words, if the jury give damages under forty shillings, that the plaintiff shall have no more costs than damages."

On this statute it has been decided,

1. Where the words are not of themselves actionable, but the consequential damages are the gift of the action (as here for calling plaintiff's wife an whore, *per quod* she lost her customers) though the damages are under forty shillings, yet the plaintiff shall have his full costs; for it is not the words but the special damage which is the cause of action in this case.

Brown v. Gibbons. 1 Salk. 206.

But it was further held in this case, That though the court is bound by stat. 21. Jac. I. and cannot increase the costs where the damages are under forty shillings; yet the jury are not bound by the statute, and may give 10*l.* costs where they give but ten pence damages.

2. But where the words are actionable of themselves, and special damage is laid, if the damages are under forty shillings, the plaintiff shall have no more costs than damages; for the action is for words, though the special damage is also laid.

Burrow v. Perry. 2. Id Raym. 1588. 2 Stra. 936. S. C. 3 Burr. 1698. S. P.

It has been said, that in a case of *Denny v. Wigg*, Bull. N. P. 10. that this doctrine had been over-ruled.

But

Collier v.  
Galliard.  
2. Black.  
Rep. 1062.

But in this case from *Blackstone's Rep.* which was in the *Common Pleas*, the doctrine was admitted, and held to express law on the subject.

3. " So where any other distinct offence is coupled with an action for words, if there is a general verdict, it is not within the statute."

Carter v. Fitch.  
1 Stra. 645.

As where the action was for words, *and also* for procuring the plaintiff to be taken and brought before a justice of peace: verdict for the plaintiff, and damages two shillings and sixpence. It was held, That the plaintiff should have his full costs; for it was not an action for words only and the rest aggravation, but for two distinct offences.

Drury v. Fitch.  
Hutt. 16.

4. In an action for words not actionable, the plaintiff was nonsuited. It was moved that the defendant should have no costs, as they should only be given where the plaintiff could have, if he recovered, which here he could not, as the words were not actionable; but the court over-ruled the distinction, and the defendant had his costs.

## CHAPTER XL.

### The Action of Malicious Prosecution.

**T**HIS is an action whereby damages are recovered for any action against or prosecution of any one, either by suit, indictment, or other legal process, where such action or prosecution appears to arise from any corrupt motive, and to be without any ground or cause for the same.

In treating of this action, I shall first consider, For what suits or prosecutions it lies. 2dly, Of actions on the case, in the nature of a conspiracy. 3dly, Of the pleadings. 4thly, Of the evidence. 5thly, Of the damages.

#### 1<sup>st</sup>. FOR WHAT SUITS OR PROSECUTIONS THIS ACTION LIES.

1. To bring a *civil action*, though the plaintiff has no grounds, is not actionable, because it is a claim of right, and the plaintiff finds pledges of prosecuting is amerceable *pro falso clamore*, and is liable to costs. Savill v. Roberts. 8alk. 13.

But to this as a rule are certain exceptions.

1. "As if a person for the purpose of vexation, and of holding a person in custody, sues him for a *greater debt than is really due*. As by such means he may suffer long imprisonment from inability to find bail."

As where the plaintiff declared, that being indebted to the defendant only in the sum of 40*l*. that he for the purpose of holding him to excessive bail, and so keeping him in gaol, sued out a writ, and had him held to bail for 5000*l*. In consequence of which he was for several days detained in gaol. The plaintiff recovered for this special injury, and had judgment accordingly. Daw v. Swaine. 1 Sid. 424.

So

Skinner v.  
Gunton, & al.  
1 Saund. 228.

So where the plaintiff declared, "That the defendant *not having any cause of action*, had caused the plaintiff to be arrested for 300 l. whereby he was detained in prison for a long time," &c. The plaintiff recovered for the injury.

Neal v. Spencer.  
Cal. K. B. 257.

But in such case it has been held, That the action will not lie for arresting the plaintiff without cause of action, if he be not held to excessive bail.

Salk. 14.  
Thurston v.  
Bunnys.  
March. 47.

2. Where there is a good cause of action; as where a debt is really and *bona fide* due, but a stranger without the privity of the person to whom the money is due, sues out a writ and arrests the debtor for it, he may maintain an action for it, though he was then actually liable to be sued by the real creditor; the party who made the arrest having no cause of action himself, nor authority from the real creditor.

3. "Where there is a good cause of action, but the plaintiff sues in a court which has not cognizance of the cause, this action will lie: But in such case it seems that it should appear that the plaintiff knew that the court had not cognizance of the cause."

Gedlin vs  
Wilcock.  
3 Will. 302.

As where the action was brought for arresting the plaintiff in this action by process out of the court of *Bridgewater*, when the cause of action did not arise within its jurisdiction, and the plaintiff recovered: on a motion for a new trial, the court were of opinion, That the mere suing of a person in an inferior court not possessing jurisdiction, was not of itself a sufficient foundation for this action, *unless it appeared that that circumstance was known to the plaintiff* in that action, and also some degree of malice appeared: as here the cause of action arising in *Taunton*, where the plaintiff might have been sued, but the defendant arrested him publicly at a fair at *Bridgewater*.

Atwood v.  
Monger.  
Style 378.

So where the action was for causing a false presentment to be made against the plaintiff before the conservators of the river *Thames*, in a matter which did not appear to be within their jurisdiction, this action was held well to lie.

"So for suing a man in the Ecclesiastical Court for matters not cognizable there, this action lies."

Waterhouse v.  
Bawd.  
Cro. Jac. 133.

But in such case the court must want *original jurisdiction* of the cause; for the action will not lie if the action is from its nature suable there, but happens to be barred by the defendant's plea. As if it was for *tithe of wood*, which afterwards

afterwards appeared to be *timber*, for which no tithe is due, suits for *tithes generally*, being suable in the Ecclesiastical Court, but not tithes of *timber*.

4. " Though the action be brought in the proper court, Hob. 260. " yet may this action be maintained, if the *suit or proceeding* " is *utterly without ground*, and *that known to the person him-* " *self*, for the undue vexation and damage to the plaintiff."

As where the defendant had sued out a second *feri facias*, Waterer v. and sold the plaintiff's goods, *though he had taken before other* Freeman. *goods under a former fi. fa.* and in this case it was moved in Hob. 260, 266. arrest of judgment, that this having been a civil proceeding that the action would not lie; but the court held, That the former *fi. fa.* being known to the defendant, that this second one was clearly malicious: but if he had not known of the first *feri facias*, that the action would not have lain.

5. So this action was held to lie for suing the plaintiff in Hocking v. the Spiritual Court, and causing him to be excommunicated Matthews. " *false, fraudulenter & malitiose, without giving him notice.* 1 Vent. 86. 1 Lev. 292.

6. " It is not necessary that the first action should have " been *heard* and decided in the defendant's favour; for this " action equally lies for *any groundless proceedings what-* " *soever.*"

For where the plaintiff declared that the defendant, in- Martin v. tending to deprive him of his liberty without any probable Lincoln. grounds, sued out a writ of privilege out of C. B. and after Mich. 27 an appearance put in by the plaintiff, that defendant, know- Car. 2 C. B. ing he had no probable cause, suffered himself to be *non-suited*, Bull. N. P. 13. the action was adjudged well to lie.

7. " But when this action is brought on the ground of a " former civil suit having been commenced against the plain- " tiff, it is to be observed,"

1st. That this action must not be brought till the former Farrell v. action has been determined; because till then it cannot appear Nunn, that the first action was unjust. 2. That there must not B R. Trin. only be a thing done amiss, but also a damage either already J Geo. 3. Bull. N. P. 13. fallen upon the party or else inevitable.

2. " Such are the restrictions under which this action " may be brought for *civil suits*: But it also lies for a

M m

" mali-

"malicious preferring of an indictment, information, or process against any one."

Savill v. Roberts.  
Salk. 15.  
2 Ref.

1. If a man is indicted for any crime that may injure his reputation or fame, he may have this action; for he is falsely scandalized by the malice of his prosecutor, and this is a damage, and for which the law gives an action. 2. If a man is indicted for any offence that subjects him to *peril of life or liberty, and for which he may be punished*, he may bring this action, for he is endangered in that respect, and receives a damage. 3. If a man be falsely and maliciously indicted, though it neither touches his fame nor liberty, yet may he have this action *for the expence and injury to his property* in defending himself on the indictment.

Upon these several cases it is to be observed,

Chambers v. Robinson.  
1 Stra. 1691.  
Jones v. Gwynne,  
Gilb. Rep.  
Trin. 11 Ann.

1. That this action will lie *though the indictment is bad, so that the party could not have been convicted on it*; as where it was for perjury, and the perjury was so ill assigned, that an exception was taken to it by the judge, and the party acquitted without examining any witnesses; yet this action was held well to lie, the indictment serving all the purposes of malice, by putting the party to expence and exposing him.

Wicks v. Pentham.  
4 Term Rep.  
248.

Therefore when the plaintiff had been indicted *as constable*, for permitting a prisoner to escape, and had been acquitted *for want of form*, he being *headborough*, and not constable, and having brought an action for malicious prosecution *was* nonsuited, the judge being of opinion, *That the action could not be maintained, as he had not been acquitted on the merits*; the nonsuit was set aside, the court holding the above doctrine to be the clear law on the subject.

Payne v. Porter.  
Cro. Jac. 490.  
Salk. 14.

2. If the *indictment has been* not found by the grand jury, yet may this action be maintained; for by the preferring the indictment the party has been exposed, harassed, and put to expence.

3. "*Expence alone* will be sufficient to maintain this action."

Smith v. Hixton.  
2 Stra. 977.

For where this action was brought for maliciously prosecuting the plaintiff and his wife for receiving stolen goods, and on *Not guilty* pleaded, the jury found for the defendant as to prosecuting the husband, and for the plaintiff as to the prosecution of the wife; and it was moved in arrest of judgment, that the husband should not have judgment on this, as the wife should be joined: but the court held, *That the expence*

expenditure alone which the husband had been at in her defence would support the action, though he himself was in no danger.

3. "But in general, in all cases in which this action is brought, the plaintiff must shew *malice in the defendant*, and want of a probable cause; and both must concur."

But from the want of a probable cause, malice may be, and most commonly is implied: but from the most express malice the want of a probable cause cannot be implied. For a man from a malicious motive may take up a prosecution, or he may from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this action.

Per Cur.  
4 Burr 1974.  
Per Lord  
Mansfield in  
Johnstone v.  
Sutton,  
1 Term. Rep.  
544.

"In trials therefore in this action, if the plaintiff can prove either from the circumstances of the case, as from having a verdict, an acquittal, &c. that the action or prosecution was groundless, and so that there was no probable cause, it shall be sufficient, unless the defendant can shew satisfactorily to the court, that there was a probable cause."

As where the plaintiff brought this action against the defendant, for having seized sixty-one hogsheds of brandy on board his ship, which brandy was condemned by the sub-commissioners of excise, but which condemnation was reversed by the commissioners of appeal.—After a verdict for the plaintiff, judgment was arrested; for the brandy having been condemned by the sub-commissioners of excise, shewed that there was some probable cause for the seizure, so that one ground of this action failed, viz. the want of a probable cause; and the defendant had judgment.

Reynolds v.  
Kennedy.  
1 Will. 232.

So where the action was for putting the defendant under an arrest on board his own ship for disobedience of orders, of which he was afterwards acquitted by sentence of a court martial, and the plaintiff had a verdict: it being for a matter properly cognizable by a court-martial, and for which some probable cause appeared, the judgment was arrested.

Johnston v.  
Sutton, in error.  
Term Rep. 493.

"And what shall be deemed a probable cause, is matter upon which the court shall decide, not the jury."

As in the two cases last mentioned.

So where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury, and obtained a verdict: upon a motion for a new trial, the court set the former

Golding v.  
Crowle.  
NICH. 25 G 2.  
Bull. N. P. 14.

former verdict aside, it appearing from the notes of the judge, that there was a probable cause; not as being a verdict against evidence, but against law.

Morgan v.  
Hughes.  
2 Term Rep.  
225.

And note, That where a justice of peace without any regular information before him, grants a warrant to apprehend a person on a supposed charge of felony, and commits him to prison on such charge, this action will not lie: for the immediate act, the arrest and imprisonment is the offence, and therefore the action should be trespass, *vi et armis*.

### 3d. OF AN ACTION ON THE CASE IN THE NATURE OF A CONSPIRACY.

Finch's Law,  
305.

An action on the case in the nature of a conspiracy lies where two or more combine for the purpose of preferring indictments, charging crimes against any one without foundation, or otherwise conspiring to prejudice a man wrongfully, either in person, fame, or property.

The Poulterers case.  
9 Co. 55. b.

1. There are four incidents to a conspiracy. 1. It ought to be disclosed by some manner of prosecution, or by making of bonds or promises to one another. 2. It ought to be malicious for unjust revenge. 3. It ought to be false against the innocent. 4. It ought to be out of court voluntarily.

2. "But there is a distinction between an action of conspiracy, properly so called, and an indictment for a conspiracy."

9 Co. 56. b.

1. "An action of conspiracy, properly so called, lies not unless the party has been indicted *& legitimo modo acquittatus*, for so are the words of the writ; but it seems that an indictment for a conspiracy will lie where there has been a false conspiracy among many, though nothing has been put in execution."

"So there is a difference between an action of conspiracy and an action on the case in the nature of a conspiracy."

Subley v. Mett.  
2 Will. 210.

For if an action of conspiracy is against two or more, *if* but one are acquitted, judgment shall not go against him: but where the action is case in the nature of a conspiracy, against two or more, then *one only may be found guilty*.

3. "And



3. "And this being in fact an action for malicious prosecution, with this difference, that an action for malicious prosecution may be brought against one only; but an action on the case in the nature of a conspiracy, must be against more than one, or against one, charging that he, together with J. S. or others, had conspired to indict the plaintiff, or charge him with a crime, the grounds of the action therefore are the same." Mills v. Mills.  
Cro. Car. 239,  
241.

As where an action on the case in the nature of a conspiracy, was brought against the defendants for causing the plaintiff to be arrested, and held to bail, where there was no cause of action, the plaintiff recovered. Skinner v.  
Gunter & al.  
Vent. 12.

So though the bill of indictment has *been* not found by the grand jury, yet this action will lie for the conspiracy, as before in the case of malicious prosecution. Hord v.  
Cordery.  
Hutt. 49.

### 3. OF THE PLEADINGS AND EVIDENCE.

#### AND FIRST ON THE PART OF THE PLAINTIFF.

1. "As this action is founded on the injury received from a groundless or malicious suit or prosecution, it must therefore appear to the court to have been groundless. The declaration therefore should always state that the suit or prosecution had been decided in favour of the plaintiff, for from the acquittal or discharge, the presumption is in favour of the plaintiff's innocence; and till acquittal, it cannot appear that the first was unjust." Farrell v Nunn.  
Pasch. 1712.  
Bull. N. P. 14-

As where this action was brought for a malicious presentment of the plaintiff for incest, in the Ecclesiastical Court of *Huntingdon*: on demurrer to the declaration, it was held to be bad, it not being stated *that the prosecution was disposed of and at an end, and not still depending*; for so a man might be found guilty in the prosecution, and yet recover in this action. Fisher v.  
Bristow.  
Doug. 205.

So where the action was for maliciously preferring an indictment against the plaintiff; on demurrer for cause, *That it was not stated how the indictment was disposed of*, the defendant had judgment. Lewis v. Farrell.  
1 Stra. 114.

And it is not sufficient to say, "That the plaintiff was discharged from his imprisonment;" it should state the prosecution to be at an end: for a man may be discharged though not acquitted. Morgan v.  
Hughes  
Hil. 28 G. 2  
2 Term Rep.  
225.

Skinner v.  
Gunter.  
Saund. 228.

But the defendant should *take advantage* of the not setting out the decision of the case in the declaration *by plea*, for it will be cured by a verdict.

Robins v.  
Robins.  
Salkeld 15.

2. If this action is brought for maliciously holding the defendant to bail, the declaration should state, "That the plaintiff being indebted to the defendant *in such a sum*, that defendant had sued out a writ for so much *more*, on purpose to hold him to bail in that action;" it is not sufficient to say, "That defendant caused him to be arrested, and though he offered a common appearance, yet that he held him to bail where no bail by law was required;" for otherwise the extent of the injury does not appear.

Barns v. Con-  
stantine.  
Cro. Jac. 32.

3. "Where the declaration sets out the proceedings to "have been in a court that had authority of the subject mat-  
ter, it need not exactly copy the *style of the court*, as set out  
in the record; though if *a court of a different authority* had  
been described, it would be bad."

Bushy v.  
Watson.  
2 Black. Rep.  
1050.

Therefore where the declaration in this action stated,  
"That at a *general quarter sessions of the peace* for *Middlesex*,  
the defendant had indicted the plaintiff, of which he was  
afterwards acquitted, &c." On producing the record in  
court, it appeared that the indictment was found at the *general*  
*sessions* only; the plaintiff at the trial was non-suited for the  
variance; but the court set the non-suit aside, the sessions  
appearing to be the same.

Anon.  
Case K. B. 555.

But where the malicious prosecution complained of has  
been by indictment, the declaration should correspond sub-  
stantially with the indictment, and therefore where the indict-  
ment had been for stealing *unum finitulum*, and the declara-  
tion laid it for stealing *unum finitulum*, the variance was held  
to be fatal.

4. "For as the declaration in this action sets out all the  
proceedings in the former suit, on which this action is  
founded, any misrecital is fatal if in a material part."

Franklyn v.  
Webb.  
Wills, 1 ent  
Aff. 1; 73.  
MSS.

For where the declaration stated, 1st, That the indictment  
was preferred in the year of the reign of *George III. king of*  
*Great Britain, &c.* and the indictment produced was king  
*over Great Britain.* 2dly, It stated, That the indictment was  
*against the peace, &c.*; but in the indictment produced these  
words were wanting. 3dly, It stated, That the indictment  
was preferred and tried at a sessions holden before the *justices*  
*in and for the said county*; and in the indictment it was only  
the *justices in the said county*: these variances were objected  
for

for the defendant. Mr. Justice *Mabury* over-ruled the first, the averment being the same in substance, which was sufficient; but he allowed the two last; for by the omission of the words "against the peace," the indictment was bad, and therefore those words were material: and as to the third objection, That a man might be a justice in a county, though not for it, and therefore that was bad: So the plaintiff was non-suited.

So where the declaration after setting out the record of an indictment preferred against the plaintiff, its removal by *certiorari* in *K. B.* and defendant having there traversed, it went on, and stated, "That the said traverse afterwards, to wit, on the 25th day of February, at, &c. came on to be tried," and then stated the acquittal. At the trial the copy of the record of the indictment produced in evidence, stated the award of the jury *protes*, "if the chief justice shall come, &c. on Tuesday next after the end of the (Easter) Term," &c. &c. at which time the defendant was acquitted. At the trial it was objected, that the plaintiff could not prove the allegation of his acquittal but by record, and that this record proved it on a day different from that laid in the declaration: and so the variance was fatal. It was answered, That the day laid in the declaration was under a *viz.* and so was immaterial, and that the party might shew the true time. Lord *Kenyon* was of opinion, That he could not admit evidence to contradict the record; and nonsuited the plaintiff. On a motion for a new trial, the court concurred with the judge, that it was a material allegation though laid under a *viz.* and that the variance was fatal; though they agreed that the declaration might lay the acquittal on the first day of the sittings, and prove it on any other day in the same sittings, and it would not be fatal, as the whole sittings were to be considered as one day.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1, "As to support this action there must both appear to be malice and a want of probable cause, though express malice be proved; yet if defendant can prove a probable cause, he shall have a verdict," Bull. N. P. 14.

Therefore the defendant's plea should shew what causes and grounds of suspicion he had to prosecute the plaintiff: as if it was for indicting the plaintiff for felony, he should shew his grounds for suspecting him, as that he was found on the spot, &c. Knight v. Jermyn. Cro. Eliz. 134.

Johnson et ux.  
v. Browning.  
6 Mod. 216.

So he should shew that a felony was committed, and if there was nobody present at the time of the supposed felony but the defendant and his wife, their oath at the trial of the indictment may be given in evidence to prove the felony.

Pain v. Rochef-  
ter & al.  
Cro. Eliz. 871.

2. So in case in the nature of conspiracy, the plea should set out the case as it was, and the circumstances inducing the defendants to prefer their bill or indictment against the plaintiff.

Chambers v.  
Taylor  
Cro. Eliz. 900.

And where the defendant so sets out the special matter, he need not traverse the *false & malitiose* laid in the declaration, since he states the facts which the plaintiff might have traversed.

#### 4. OF THE EVIDENCE.

##### I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

Croke v.  
Dowling.  
E. 2. G. 3.  
Bull. N. P. 14.  
last Ed.

1. In an action for maliciously holding the plaintiff to bail, the court held it, 1st, That it was not necessary to prove that *there was any affidavit of debt to hold the defendant to bail*, for that the indorsement on the writ was sufficient. 2dly, That if the declaration had averred that such an affidavit had been made, *an office-copy of it would have been sufficient*; but if it were stated to have been made by defendant himself, perhaps the original affidavit itself should be produced and proved.

Morrison v.  
Kelly  
1 Black. Rep.  
385.

2. If this action is for maliciously indicting the plaintiff *for a felony*, on which the defendant has been acquitted, *there must be copy of the record and acquittal from the court where the trial was had*, and which must be granted by that court, produced in evidence: but where the indictment is only for a *misdemeanor*, as for keeping a disorderly house, such a copy is not necessary. Here the clerk of the sessions attended with the record of the acquittal for the misdemeanor at the sessions, and it was held to be good evidence.

Carth 421.  
3 Black. Com.  
126.

As therefore the court where the acquittal was, must grant a copy of the record and acquittal, in order that the plaintiff may maintain his action, and it is discretionary in them to grant or withhold it, it is therefore usual to deny a copy of the indictment where there has been any, at least, probable ground to found such a prosecution on.

But

But where the plaintiff and another were indicted for *Jordan v. Lewis*, forgery at the *Old Bailey*, and acquitted, and a copy of the indictment and acquittal granted to the *other only*; in this action which was for the malicious prosecution, the plaintiff offered the copy of the indictment so granted in evidence; and the order at the *Old Bailey* was read by way of objection: but the chief justice admitted it, saying, That an order was not necessary to make it evidence, nor is it ever produced in order to introduce it: so it was read, and the plaintiff obtained a verdict; which the court refused to set aside. *1 Stra. 1122.*

2. The plaintiff may give in evidence the substance of that given on the indictment, and the charges of the acquittal, and the circumstances which shew that the prosecution was malicious and without probable cause; and he may likewise give in evidence the circumstances of the defendant, in order to increase the damages. *Clayton v. Nelson. Pasch. 1712. Middlesex, Per Parker, Ch. J. Bull. N. P. 13.*

As in this case, in evidence of malice, the plaintiff was allowed to give in evidence, *advertisements put into the papers by the defendant*, mentioning, that the indictment had been found against the plaintiff, and other scandalous matters, though an information had been granted for them as libels. *Chambers v. Robinson. Stra. 691.*

3. The defendant's name on the back of the bill is sufficient, and the best evidence of his having been sworn to the bill; so it may be proved that he was a witness without having the bill. *Johnson & ux. v. Browning. Mod. Caf. 212.*

But a person's name being indorsed is no evidence that he was prosecutor: for in this case it was the name of the justice and others, who were to give evidence. *Girlington v. Pitfield. 1 Vent. 47.*

In an action for a malicious prosecution by indicting the plaintiff at the quarter sessions, the defendant produced the original indictment, which was admitted; but it being objected, That though this was admissible evidence to prove the defendant the prosecutor, by shewing his name on the back of the bill, yet it was no evidence as to the caption, which is a material averment in the declaration, *viz.* that the quarter sessions were held at such a place and time, and before such justices: Justice *Wilmot* was clearly of opinion, That this could not be supported by parol evidence of the minutes of the sessions; but that for this purpose a record should have been made up, and the original, or a copy, produced: So the plaintiff was nonsuited. *Edward v. Williams. Monmouth Lent Ass. 1764. MSS.*

In an action for maliciously holding the present plaintiff to bail when nothing was due, and in which the defendant had been *Rogers v. Ilcombe. Taunton, Lent Ass. 1785. MSS.*

been nonsuited: to prove the holding to bail, *an office-copy of the affidavit* made by the defendant (then the plaintiff) was offered in evidence. It was objected to, that the *original affidavit itself* ought to be produced: but Justice Buller said, 'This evidence had been held sufficient, in a case from the home circuit; and that he had held the writ as indorsed sufficient evidence: the plaintiff then offered evidence as part of her damages in this action, *the costs she had been put to in defending the former action*; to which it was objected, that these costs having been taxed upon that action and paid to the present plaintiff, that she should not go for them again in this action. *E Contra*, it was insisted, 'That as the extra costs always exceeded the taxed costs, that they might go for these: and the defendant's counsel further objected, 'That the gist of the present action being the arrest, that no costs could be proved as damages, but those occasioned by the present arrest: and the judge rejected the evidence, apparently on both grounds.

Goddard v.  
Smith.  
Salk. 21.  
Mod. Caf. 261.

4. If the plaintiff declares for a malicious indictment of which he was *lawfully acquitted*, if on the trial it appears that he got off by a *noli prosequi*, the evidence will not maintain the declaration; for a *noli prosequi* is only a discharge to the indictment, but no acquittal of the crime. But if the party had pleaded Not Guilty, and the attorney-general had confessed it, that would support the declaration.

Rex v. Parsons  
& al.  
2 Black. Rep.  
392.

5. In this case, which was that of the *Cock Lane ghost*, the court held that there was no need of proving *the actual fact of the defendants meeting and conspiring together*; that that might be collected from collateral circumstances. It was on *an information: ideo quære* if there is any difference in the case of an action?

#### I. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Sevill v.  
Roberts.  
Salk. 15.

Cobb v. Carr.  
Middlesex.  
Mich. 1746.

Parrot v.  
Fishwick.  
London after  
Trin 1772.  
Bull. N. P. 14.

Though an action will lie for a malicious prosecution, yet it is not to be favoured: therefore if the *indictment has been found by the grand jury*, the defendant shall not be obliged to shew a probable cause; but it shall lie on the plaintiff to prove express malice. However, if he can, the defendant should give evidence of a probable cause, and for this purpose, proof of the evidence given on the indictment is good. And where the fact lies in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice.

So in an action for malicious prosecution, *Lord Hardwicke* said, That actual and express malice need not be proved; but it was incumbent on the defendant to shew probable cause for the prosecution; for without that, the law will imply malice in the first prosecution. *Verdale v. Manfell. M. 9 G. 2. MSS.*

## 5. OF THE DAMAGES.

1. The foundation of this action being malice, and the want of a probable cause, the court refused to grant a new trial for excessive damages, though no injury had happened to the plaintiff's trade or reputation, and the sum expended in his defence was much less than the damages given; for the court held, That the *malice* should enter into the consideration of them. *Farmer v. Darling. 4 Burr. 1972.*

2. How far the jury may sever in the damages it has been decided; that where this action was brought against the prosecutor of the indictment, and the justice who had committed the plaintiff, and the jury gave 200 *l.* damages against the prosecutor, and 20 *l.* against the justice. *Ch. Just. King* took the verdict so. But in this case, against several defendants the jury gave 800 *l.* damages against one, and 100 *l.* each against three others. *Lord Raymond* said, it could not be done; and a verdict was given for 1100 *l.* against them altogether, *id est quare.* *Lane v. Santeloe. 1 Stra. 79. Lowfield v. Bancroft. 2 Stra. 910.*

## CHAPTER XII.

### The Action of Trover.

**T**ROVER is an action which lies where one man gets possession of the goods of another by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells or converts them to his own use, without the consent of the owner; for which the owner by this action recovers the value of his goods.

In this action the defendant is supposed to have come legally into possession of the goods, and the wrong done, or the gift of the action, is the illegal conversion of them to his own use; without which the action cannot be maintained.

I shall in this action consider, 1st, The nature of it, with reference to the things for which it lies: 2dly, With reference to the person: 3dly, The pleadings: 4thly, The evidence: 5thly, The damages and costs.

#### I. OF TROVER WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

##### I. IN THIS ACTION THE VALIDITY OF SALES MAY BE TRIED.

These are, 1st, Sales by the intervention of a factor or agent: 2dly, Sales by the sheriff: 3dly, Sales of stolen goods: 4thly, Sales void by stat. 13 of *Eliz.*

#### 1. Of Sales by the Intervention of a Factor or Agent.

1. "If goods are *not delivered* to a factor or agent: but "he is only *impowered to sell* by the principal, this shall not "preclude the principal himself from selling them."

*Aleyn v.*  
*Taylor.*  
*Aleyn 93.*

For where the defendant, being owner of a great quantity of malt, then being on board a vessel, impowered one *Smith* a broker to sell it; before *Smith* sold it, the defendant



ant himself had sold it, but *Smith* had no notice; afterwards *Smith* sold it to the plaintiff, who brought trover for it against the defendant: it was at first doubtful whether *Smith* the broker would not be liable to the plaintiff, as he could not perform his bargain, though it was without his default, so that his sale ought for that reason to be held valid: but afterwards, *Rolle Chief Just.* held, That the owner's sale should prevail against that of his factor, *who had but a bare authority*, and that the broker's sale should have been conditional, if the owner had not sold before; but he said that neither the broker nor his vendees should be liable to any action for detaining the goods, if they had no notice of the sale by the owner.

2. A factor has only power to *sell* the goods of his principal, and thereby bind him: he cannot bind or affect his principal's property, by *pledging* them as a security for his own debt, though there is the formality of a bill of parcels and a receipt. *Paterfon v. Tash.*  
2 *Str.* 1178.

## 2. Of Sales by the Sheriff.

In this case, the sheriff having taken goods in execution, was discharged of his office before a sale or the writ returned; but he afterwards sold the goods without a *venditioni exponas*: upon trover being brought for them, it was resolved, That the *fieri facias* gave him an authority to sell without any writ, though he was out of office. *Ayre v. Aden.*  
*Cro. Jac.* 73.  
*Yelv.* 44.  
8. C.

## 3. As to the Sales of Stolen Goods.

By stat. 21 H. 8. c. 11. "Goods stolen shall be restored, to the owner, upon his giving or procuring evidence against the felon, so that he be prosecuted to conviction."

Wherever therefore the felon is convicted, the owner may maintain trover for the goods stolen, into whose hands soever they have come; and at common law they were not bound, even by a sale in market overt. 2 *Inst.* 714.  
*Kel.* 47.

But if stolen goods are sold in market overt, the owner cannot maintain trover for them till after the conviction, for it depends on that whether he will be entitled or not, as till then he has no property, which is necessary to maintain this action; and if the person who so bought them in market overt, sells them in the interval before conviction of the felon, he shall not be liable to an action of trover; for he shall not be obliged to keep the goods which may be of a perishable nature: and that shall be so, though he received notice from the owner of the  
the

*Harwood v. Smith.*  
2 *Term Rep.* 750.

the goods of their being stolen: but *per Lord Kenyon* the plaintiff having a right to restitution of his goods, would perhaps be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them up; for then the goods are converted to the prejudice of the owner.

#### 4. As to Sales void by Statute 13 *Eliz. c. 5.*

By this statute it is enacted, "That all feoffments, gifts, alienations and conveyances of lands or goods, and all and every bond, suit, judgment, and execution made to the intent to defraud creditors, shall be null and void."

*Wells v. Burrows.*  
In case 1745. &  
*Taylor v. Jones.*  
*Ibid.* 1543.  
*Buller N. P.*  
257.

1. But it seems settled, That no conveyance shall be deemed fraudulent within the statute, unless it can be proved that the person was indebted at the time of the assignment or conveyance, or very nearly so, so that they may be connected together.

*Twyne's case.*  
3 Co. 80. b.

2. That where one *Pierce* being indebted to *Twyne* in 400l. and to *C.* in 200l. and *C.* having brought an action of debt against *Pierce*, pending the writ, he made a general deed of gift of all his goods and chattels to *Twyne* in satisfaction of his debt, but notwithstanding, *Pierce* still continued in possession of his goods, some of them he sold, he shorn the sheep, and marked them with his own mark, and exerted every act of ownership: this transaction appearing, it was clearly held, That the conveyance to *Twyne* was fraudulent and void within the statute 13 *Eliz.*; for it was made with a trust between the parties, and the owner continuing in possession, it gave him a credit whereby he traded with others, and so was enabled to cheat and defraud them.

*Stone v. Grubham.*  
2 Bull. 218.

*Per Buller Just.*  
2 Term Rep.  
595.

3. "Wherever therefore a person makes a bill of sale of his effects, or any other similar conveyance, unless possession follows and accompanies the deed, it shall be deemed fraudulent, and the goods may be recovered in trover."

*Barnford v. Baron, quot.*  
2 Term Rep.  
594.

As where in trover by the sheriff for goods which had been taken by the defendants, after they had been taken in execution by him at the suit of a creditor, in April 1787; the defendants set up an assignment of the goods by *Hayes* (who was the owner) to two persons for the benefit of such of his creditors as would sign a composition-deed by a certain time, which assignment was dated 16 August 1786; the plaintiff replied, that in that assignment it had been agreed that *Hayes* should continue in possession till May 1787, and that he did so continue in possession; upon which

which the court were clearly of opinion that the assignment was fraudulent, and void within the statute 13 *Eliz.* though it appeared that during that time *Hayes* was to account with the two trustees for the profits of his business; and the plaintiff recovered accordingly.

So where a person, being indebted both to the plaintiff and the defendant, made a bill of sale of all his effects to the defendant, in which was a clause that the defendant should be at liberty within fourteen days from the execution of the bill of sale, to enter upon and sell the effects so assigned, in case the money was not sooner paid; before the end of the fourteen days, the person died; upon which the defendant entered upon the goods and sold them, when it was held that the owner having been left and dying in possession of the goods, that the assignment was fraudulent, and that the defendant, having so interfered, should be liable to the whole of the plaintiff's debt as executor *de son tort*.

*Edwards v. Harben.*  
2 Term Rep. 587.

4. "But the cases here are where the conveyance is *absolute*; for cases may occur in which the owner may continue in possession, and yet the conveyance not be fraudulent: as if the conveyance is *conditional*, there the vendor's continuing in possession does not invalidate the sale, *because by the terms of the conveyance* the vendee is not to have possession till he has performed the condition."

Per Buller, Just. in S. C.

"So where the want of immediate possession is consistent with the deed."

As where on the marriage of Lord *Montfort*, the household goods of his house in town were, *inter alia*, conveyed to trustees, in strict settlement: Lady *Montfort's* fortune was 10,000*l.* equal to pay all his debts at the time of his marriage, and the goods were added to the settlement, Lord *Montfort's* real estate not being deemed sufficient to make an adequate settlement; the defendant was a creditor before Lord *Montfort's* marriage, and had taken the goods under an execution: on trover brought for the goods by the trustees, it was held clearly, That the statute 23 *Eliz.* was only intended to operate against *fraudulent* conveyances, and that possession *there* was not evidence of fraud; that this therefore being a fair and proper settlement, could not be deemed void under the statute, particularly as Lady *Montfort's* fortune was equal to pay all the debts; and the household goods were included in the settlement for a sufficient reason.

*Cadogan v. Kennett.*  
Cowp. 432.  
*Vid. et Foley v. Burnell*, quot. Cowp. 435.  
S. P.

So where personal property, and among other things, some jewels were settled on the marriage of the plaintiff's wife on certain

*Hastington v. Gill.*  
2 Term Rep. 597.

certain trusts, they were held not to be liable to the husband's debts:

Vid. Jarman v. Wollootton. *Post* in this chapter.

In delivering his opinion in the last case, Lord Mansfield said, That courts of law had gone every length to protect personal property in the wife, in cases clear of fraud, that this was done by the intervention of trustees in whose hands all fair settlement of the wife's property before marriage was protected; but where the conveyance is after marriage, that is void against creditors, as being without consideration.

Prof. in Chan. 426, 181.

But where a settlement is made after marriage, *the portion being paid at the same time*, such is good against creditors; so it has been holden; That where the settlement was made after marriage, recited to be in consideration of a portion secured, where in fact such portion has been secured, that that was good against creditors.

5. "Another case of sales not void under the statute though no possession has been delivered, is that of the sale or assignment of *ships at sea*."

Atkinson v. Malling. Pasch. 28 G. 3. 2 Term Rep. 462.

For if a ship be sold while at sea, *a delivery of the grand bill of sale* amounts to a delivery of the ship itself, for it is the only delivery of which the subject matter is capable; and besides, it does not give any degree of false credit to the vendee or assignee. *Vid. post plenius.*

Rolleston v. Hibbert. 3 Term Rep. 406.

But an absolute bill of sale of a ship at sea, is void under statute 26 Geo. 3. c. 60. unless *there has been a registry of the ship, and the certificate of the registry be recited in the bill of sale*, even though the vendee had given an undertaking to restore the ship on a certain day, on payment of the sum advanced on her credit.

6. "No person can take advantage of this statute, but the creditors themselves."

Hawes v. Leader. Cro. Jac. 270.

Therefore where *A.* having made a fraudulent conveyance of his goods to *B.* and then died, *B.* brought an action against *A.*'s administrator for the goods; it was held, *That the administrator could neither plead the statute nor maintain the possession of the goods, even to satisfy the creditors; but the court held, That they might charge the vendee as executor de son tort.*

## 2. INSTRUMENTS CONVEYING A CHOSE IN ACTION, MAY BE RECOVERED BY TROVER.

Jones v. Wickworth. Hard. 111.

As where this action was brought for *letters patent of wine licence*; after a verdict for the plaintiff, it was moved in arrest of

of judgment, that a record cannot be converted: *sed non allocatur*, for the words *letters patent* here signify the exemplification of them under the broad seal, and so is intended in *common parlance*; for which this action lies.

So trover was in this case held to lie for a bill of exchange. *Lucas v. Hayes.*

So for *million lottery tickets.*

So for a *bond.*

So for *the title-deeds of an estate.*

*Salk. 130.*  
*Ford v. Hopkins.*  
*Salk. 283.*  
*Arnold v. Jefferson.*  
*Salk 654.*  
*Yca, Bart. v. Field.*  
*2 Term Rep. 708.*

### 3. TROVER WILL NOT LIE FOR GOODS WHICH HAVE BEEN CONDEMNED BY A COURT HAVING COMPETENT JURISDICTION.

As where the plaintiff brought an action of trover for a ship, tackle, and furniture, which ship had been condemned by the admiralty of France as prize, and bought by the plaintiff when sold under the sentence, but had been taken out of his possession by the defendants claiming property on the ground of the capture being illegal: it was resolved, That the courts here were bound to give credit to the sentence of foreign courts, and that their condemnations were not examinable at common law; and therefore the plaintiff had judgment.

"But where the jurisdiction of the court is in any respect limited, there trover will lie for goods which have been seized or condemned by such courts, for the purpose of trying if such courts have exceeded their jurisdiction."

As in the case of condemnations by the commissioners of excise, who though under the statutes of excise, they are invested with the right of condemning exciseable goods, &c. yet may the owner nevertheless maintain an action of trover for them, if he supposes them illegally condemned.

*Papillon v. Buckner.*  
*Hard. 478.*  
*Terry v. Huntington.*  
*Hard. 480.*  
*S. P.*

4. Another case in which trover lies, is to try the property arising under

### CONSIGNMENTS OF MERCHANDIZE.

This is, first, To a creditor: 2d, To a factor: 3d, To any other person.

#### And 1st, Of Consignments to a Creditor.

1. The indorsement of the bill of lading to a creditor, conveys an absolute property to the indorsee; and he may maintain

*Hibbert v. Carter.*  
*Pulch.*  
*1 Term Rep. 745.*

maintain trover for the goods included in such bills of lading.

Caldwell v. Ball  
Pasch.  
1 Term Rep.  
205.

And where there are several bills of lading, of different imports, which are differently indorsed, the person who first gets one of them by legal title from the owner or shipper, has a right to the consignment in exclusion of the others.

## 2. Of Consignments to a Factor.

Per Lord Mansfield, in Wright v. Campbell.  
2 Burr. 2046.

If there is an authority ever so general by indorsement of the bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien till the delivery of the goods, and until they are actually sold, and turned into money.

Ibid.

But if the goods are *bona fide* sold by the factor while at sea, such sale shall be good, and shall bind the owner, because the goods were *bona fide* sold, and by the owner's own authority.

S. C.

And if a factor to whom a bill of lading is indorsed generally, but in fact to him as factor, though that is not expressed, indorses it over as his own property; such indorsement shall be good, if for a fair and valuable consideration and without notice; *aliter* if only a spurious one to defraud the owner.

## 3. Of Consignments to other Persons.

Lickbarrow v. Mason.  
Mich. 28 G. 3.  
2 Term Rep.  
63.

1. After goods have been consigned, the consignor, if he thinks fit, may stop the goods before they come to the hands of the consignee, as if the consignee becomes insolvent or a bankrupt. (*Snee v. Prescott*, 1 Atk. 245.)

"But this power of stopping the goods is only while they are *in transitu*; for if they come into the possession of the consignee, then the property is changed, and the consignor cannot stop them."

Ellis v. Hunt,  
& al.  
3 Term Rep.  
464.

As where in trover for a quantity of files, the case was that Moore the bankrupt had ordered the goods in question on the 31st of October, from the plaintiffs, who were manufacturers at Sheffield: on the 14th of November they were sent by the waggon, and arrived in London on the twenty-second; the plaintiffs drew a bill on Moore for the amount, but it was never paid: on the 15th of November a docquet was struck and on the 18th the commission issued, and the defendants chosen assignees: on the 24th a provisional assignment was

made to the messenger under the commission, who on the same day demanded the goods of the defendants, and *put his mark upon* the cask, but did not take them away: on the 28th of *November* the plaintiffs wrote to the agent of the waggon to stop the goods, in case they had not been delivered; and brought their action against the carrier and assignees of the bankrupt, who had got possession of them: the court were of opinion, That *sufficient possession had been taken by the assignees under the commission*, which it therefore was not in the power of the consignor to divest or countermand; and therefore gave judgment for the defendants.

But if the consignee to whom the bill of lading is indorsed, *does not part with his whole interest* in the goods, but only assigns it to another as a collateral security to him, and so *remains interested, or as a partner* in the goods, notwithstanding the assignment; there the property of the consignor is not divested, but he may stop the goods before they reach the hands of the consignee or of the person to whom he indorsed the bill of lading.

Salomons v.  
Nissen.  
2 Term Rep.  
674.

5. Another case in which this action is usual, is to try the validity of

#### COMMISSIONS OF BANKRUPT, OR TO RECOVER GOODS BELONGING TO THE BANKRUPT ESTATE.

In all actions in which the bankruptcy comes in question, it is necessary to go through all the steps before entered into by the commissioners; that is, to prove, 1st, That the party was a trader: 2dly, The act of bankruptcy: 3dly, The petitioning creditor's debt: 4th, The issuing of the commission: 5th, The assignment: 6th, A property in the bankrupt.—I shall therefore consider each of these in their order.

##### 1. The Party must be a Trader.

Who are to be deemed *traders* within the bankrupt laws depends either on express statutes, or on the decision of the courts on the meaning of that term (trader) as consistent with the spirit of the statutes.

1. The general description of persons subject to the bankrupt laws, is under statute 13 *Eliz. c. 7. viz.* "Persons using the trade of merchandize by buying or selling by way of bargaining, exchange, re-change, barter, or chevifance by gross or retail, or who seek their living by buying or selling."

2. By statute 21 *Jac.* 1. c. 19. "Persons using the trade of a *scrivener*, receiving other men's money into their trust or custody, may be bankrupts."

3. By stat. 5 *Geo.* 2. c. 30. "Bankers, brokers, and factors, are declared to be liable to the bankrupt laws."

4. "Persons having stock in several public companies, as by several statutes declared not to be objects of the bankrupt laws: as having *East India* stock (by statute 14 *Car.* 2 c. 24.) *Bank* stock; shares in the *English* linen company; royal fishing company; *Guinea* company; *London Assurance* company; *South-sea* company; *Plate-glass* company; or being concerned in the circulation of *Exchequer* bills; by the several statutes of 7 & 8 *W.* 3. c. 31. 8 & 9 *W.* 3. c. 2. *stat.* 47. 5 *Ann.* c. 13. 7 *Ann.* c. 7. 3 *G.* 1. c. 8. & 4 *G.* 3. c. 37. f. 14."

*Colt v. Netterville.*  
2 P. Wms. 308.

Neither shall buying or selling stock, or other government securities; for they are not goods, wares, and merchandize.

5. By stat. 5 *Geo.* 2. c. 30. f. 40. "No farmer, grazier, drover, or receiver-general of the land-tax, shall be liable to be made a bankrupt."

Under these statutes it has been held,

*Per Lord Mansfield.*  
*Cowp.* 750.  
*Com. Dig.* 522.  
2 *Black. Comm.*  
476.

*Ibid.*

*Crump v. Barne.*  
*Cro. Car.* 31.

1. The general words of the statute 13 *Eliz.* being, "*who seek their living by buying or selling*," a man who lives by buying only, or by selling only cannot be a bankrupt: and for the same reason it being for the purpose of *seeking a living*, one single act of buying and selling will not make a man a bankrupt, for it must be a repeated practice, and profit sought by it: and on the same principle; no handicraft occupation (where nothing is bought or sold, and so an extensive credit for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as a gardener, gold-beater, &c. who are paid merely for their work and labour.

2 *Black. Comm.*  
476.  
*Luton v. Bigg.*  
*Skinn.* 292.

But where persons buy goods and make them up into saleable commodities, though part of the gain is by bodily labour and not by buying or selling, yet these are within the statutes of bankrupts, for the labour is only in melioration of the commodity, and rendering it more fit for use; therefore, according to the doctrine before delivered, a mere working taylor cannot be a bankrupt; but a merchant-taylor, who buys cloth and makes it up for his customers, may be a bankrupt; and so of other trades, as bakers, brewers, clothiers, &c.



So the court of *B. R.* held, That a *butcher* might be a bankrupt. 3 Mod. 330.  
Dally v. Smith.  
4 Burr. 2948.

2. "Neither is it necessary that *the trade be lawful*, in order to make the trader a bankrupt."

As where a commission of bankrupt issued against a *clergyman*, and he petitioned to have the commission superfed, on the ground that, by statute 21 *Hen. 8. c. 13.* "All spiritual and ecclesiastical persons are forbidden to follow any trade, or buy or sell for gain under a penalty:" but Lord *Hardwicke* was of opinion, That this penalty only attached against himself, and that he was liable to the bankrupt laws, the trading being proved. Ex parte Mey-  
mot.  
1 Atk. 196.

So in the same case he held, That a person who dealt merely in *smuggling and running of goods*, though this was an offence, and contrary to an act of parliament; yet still that it was a trading within the statutes; for that in both cases a person should not take advantage of the breach of one law to excuse him from the breach of another. Ibid.

3. The statute 5 *Geo. 2.* having declared that *brokers* might be bankrupts, Lord *Hardwicke* was of opinion, That *pawn-brokers* were included, and might be bankrupts; for though they are not expressly named, yet the word *broker* is the genus, and all other kinds of brokerage the species. Highmore v.  
Molloy.  
1 Atk. 206.

4. "Though the statutes mention persons only *using trade*, &c. as objects of the bankrupt laws, yet if persons in *other professions or employments*, however seemingly inconsistent, will do any acts of trading with a *view to profit*, they shall be subject to the bankrupt laws."

As a *gentleman of the bar* who had a colliery, and dealt in coals in *Durham*, was held to be a trader within the bankrupt laws. 1 Stra. 514.

So though a man be a *public officer*, as an *exciseman* or such like, yet if he will trade, he makes himself subject to the statutes of bankrupts. Per Lord  
Hardwicke.  
1 Atk. 206.

So a commission of bankrupt formerly issued against a *peer*, an earl of *Suffolk*, for trading in wines. 1 Atk. 101.

5. "*Drawing and re-drawing bills of exchange*, is an act of trading that will subject the party to a commission of bankrupt: but such should not be on a *person's own and sole account*, but *with the money of others* to make a profit."

For in this case, which was an issue out of chancery, to try if one *Wilson* was a trader within the bankrupt laws, it appeared that he was an army-agent, and that he was for many Richardson v.  
Bradshaw  
1 Atk. 128.  
quot. Cowp.  
750.

many years in the habit of drawing bills of exchange on a Captain *Johnson* of *Dublin*, who was likewise an army-agent, to a large amount, and *Johnson* to re-draw upon him. But it appeared further, that *he* also received money from officers, their widows, and others, which he kept for them, and for which they drew on him; but that when he had a large sum he did not keep it in the house, but paid it into *Drummond's* bank, on which he gave checks for any large payments he had to make: in this case the jury found him to be a trader, and the judgment was given accordingly, on the ground of the profit he derived from the exchange, and the use of the money of others.

*Hankey v.*  
*Jones.*  
*Cowp. 745.*

But where a person, engaged in expensive works, drew bills on different persons, for the purpose of raising money for those works, but allowed to the persons who accepted his bills a quarter *per cent.* commission, besides interest at 5*l.* *per cent.* and also borrowed accommodation-notes in exchange for his own, he was held not to be within the bankrupt laws; for all the transactions of the bills was on *his own account*, and for *his own benefit only*.

6. "The words of the statute of bankrupt being, *Using the trade of a merchant by buying and selling,*" the act of buying and selling must be *in the way of a merchant.*"

*Crisp v. Pratt,*  
*Cro. Car. 549.*  
*Newton v.*  
*Trigg.*  
*Salk. 110.*  
*Per Holt.*  
*Salk. 110.*

Therefore an *innkeeper* as such cannot be a bankrupt, for his living is not principally got by buying and selling, but by *the use of his rooms and furniture*; and he buys meat and drink, not for sale or trading, but for accommodation: neither does he *buy or sell at large* as a merchant, but to guests only: "For wherever a man buys or sells *under a particular restraint* or limitation, he is not a seller within the statute, for the statute is selling in the way of merchants; that is, *indiscriminately and generally to all.*"

*Saunderson v.*  
*Rowles.*  
*4 Burr. 2065.*

On the same ground that an innkeeper has been held not to be an object of the bankrupt laws, a *viuallier* who sells liquor only *in his own house*, or out of it in small quantities, as by the pot or mug, is not a trader within the bankrupt laws.

"But in this case, it must be taken that the selling out of the house was rather to oblige customers than as a means of living; for though a person follows the trade of a *viuallier*, yet if he also deals in liquors which he sells indiscriminately, whatever the quantity, he may be a bankrupt."

*Patman v.*  
*Vaughan.*  
*1 Term Rep.*  
*572.*

For where a person kept a public-house or inn, and during the time he was in business, which was about nine months, sold about six gallons of spirits altogether; but it appeared

appeared that *any person* applying for liquors, might have been supplied; Judge *Buller* left it to the jury to decide, Whether this was not a trading? and they found the party a bankrupt. And in this case the same justice ruled, That the *quantity sold* was immaterial to the question; for if he had dealt largely he would not probably be a bankrupt.

“ But however, it may perhaps be proper to take into consideration *the proportion* which the business of selling liquors out of doors bears to the business as an innkeeper or victualler, that so it may appear to be done with a view to seeking a living.”

For where in this case the person was an innkeeper, but was proved to have sold often large quantities of wine, rum, and brandy to different persons which many after retailed again, the judge nonsuited the plaintiffs who were the assignees, holding such person not to be an object of the bankrupt laws; but the court set aside the nonsuit, holding the doctrine now laid down, that at the trial the proportion of his dealings out of doors as an innkeeper, should have been taken into consideration, and left to the jury.

7. “ The stat. 5 Geo. 2. having declared farmers, graziers, and drovers to be not objects of the bankrupt laws; on this part of the statute it has been decided,”

1. If a person buys cattle at a fair, keeps them three or four days on his land, and then drives them to another fair to sell them, he is a *drover* within the statute. Milles v. Hughes. Mich. 19 Geo. 2. C. B. Bull. N. P. 39.
2. “ But though a farmer merely as such is not an object of the bankrupt laws, yet if he buys any great quantities of things, such as are the produce of his farm, and sells them, he shall be liable to a commission of bankrupt.”

As where a special verdict found that one *Richard Baxter* had occupied a farm of 300l. a year, and annually planted it with many acres of potatoes, which he sold for gain, and likewise bought from others large quantities of potatoes, which he kept in warehouses, and sold again at different markets. His dealing so extensively and in such manner, was held to make him a trader within the meaning of the bankrupt laws. Mayo v. Archer 1 Stra. 513.

So where the plaintiff was assignee of one *Davis* who, it appeared, rented a considerable farm at *Whitchurch*, and kept two or three teams of horses, that previous to his taking the farm he had lived with an uncle, during which time he attended fairs, and bought and sold several horses; and after he took the farm, he occasionally attended fairs, and bought Bartholemew v. Sherwood. Mich. 27 G. 3. 1 term Rep. 573.

bought horses which were not calculated for the farming business, and which he always sold again for some profit. On this evidence the Judge left it to the jury to decide, Whether the dealing in horses was not distinct from the farming business, and done with a view to profit? and the jury found *Davis* a bankrupt; which verdict on a motion for a new trial was afterwards confirmed by the court.

“ In these cases, the person carried on a business independent of the merely using the land; for where the whole trading arises from the land itself or its profits, the person cannot be a bankrupt.”

*Port v. Turton.*  
2 Will. 169.

As where the person against whom the commission was sued out, was proved to have *purchased a coal-mine, worked it, and sold the coals*, he was held not to be a trader within the statutes of bankrupt.

So where a person purchased *alum-works*, the same decision took place.

*Newton v.*  
*Newton.*  
quot 2 Will.  
170  
1 Term Rep.  
34.

“ For where a person exercises a manufacture from the produce of his own land, *as a necessary and usual mode of enjoying the produce of that land*, he shall not be considered as a trader within the bankrupt laws, though he buys the necessary ingredients to fit it for market. But where the produce of the land is merely the *raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land*, there he is a trader within the bankrupt laws.”

*Wells v.*  
*Parker.*  
1 Term Rep.  
34.

Therefore where a person rented a piece of ground *merely and solely for the purpose of making bricks for sale*, the court of King's Bench held that he might be a bankrupt; but this case afterwards went off on another point in the House of Lords.

*Ex parte Harrison Brown.*  
Ch. Caf. 173.

So where it was proved That the person declared a bankrupt was a farmer, and rented 100*l. per ann.* and made bricks of earth, taken off the waste without any licence from the lord (but for which he afterwards paid a consideration) that he used a kiln not built by himself, and had at various times made from 40 to 70,000 bricks every year, and sold different quantities, sometimes to particular persons only, and sometimes generally to all who came: it was held, That this being not to improve his own estate, nor in the usual mode of enjoying it, but a purchasing of the materials for carrying on a trade, that therefore he was an object of the bankrupt law.

“ A person

" 8. A person may be a bankrupt who has traded with this country, though he has resided entirely abroad, and whether he be a native or a foreigner. Dodworth v. Anderson. 1 L. Raym. 375.

As where it appeared that one *John Ashley* went from *England* in 1720, and resided in *Barbadoes* till 1735, where he was a factor, and planted and traded to *England*, sending the produce of his plantations to *England*, and receiving back goods on his own account, or as factor for others; he came to *England* in 1737, and then committed an act of bankruptcy: it was adjudged that a commission could well issue, though the trading was abroad. Ex parte Smith. Cowp. 402.

So in this case; where the person against whom the commission issued, was a native of *Scotland*, resided there, and kept an house at *Edinburgh*: he traded with *England*, and very extensively to all parts of the world: he came to *England*, where he was arrested; and having lain two months in prison was declared a bankrupt: he brought an action of trespass, in which all the authorities were considered; and the court were clearly of opinion that the commission had regularly issued. Alexander v. Vaughan. Cowp. 398.

So where a gentleman of the *Temple* went to *Lisbon*, where he turned factor, and traded with this country, he was held to be liable to the bankrupt laws, by reason of his trading and gaining a credit here. Bird v. Sedgewick. Balk. 110.

9. The daughter of a freeman of *London*, who trades separately from her husband, or any feme-covert trading separately from her husband in *London*, may by the custom become a bankrupt. Ex parte Carington. 1 Atk. 206.

And so it should seem that a feme-covert having a separate maintenance and living apart from her husband, may be made a bankrupt, for she is in such case, being liable for her own debts. (*Ante* 126.)

So where the husband and wife separated, and divided the property they possessed, and her part was assigned to trustees for her separate use, not subject to the interference or controul of the husband, and afterwards she traded: Lord Ch. *Bathurst* directed her to be found a bankrupt, notwithstanding her coverture. Cafe of Ann Fitzgerald. Green's Bank. Law. 8.

" But where a feme-sole trades and commits an act of bankruptcy, and afterwards marries, she cannot be made a bankrupt."

Therefore where *Frances Mear* had before her marriage kept an inn in *Birmingham*, by the name of *Frances Piper*, but had declined business in *December* 1784, and in *February* Ex parte Mear, Cook. B. L. 44.

ary 1785 had intermarried with *Henry Mear*: the act of bankruptcy proved was in *October 1784*, and the commission sued out in *December 1785*; on petition the commission was ordered to be superseded, on the ground of its having issued against a married woman.

## 2. Of the Act of Bankruptcy.

What are acts of bankruptcy are declared by several statutes.

1. By stat. 13 *Eliz. c. 7.* 1 *Jac. I. c. 15.* "Departing from the realm with a view to delay or defraud creditors, is an act of bankruptcy."

Ex parte Gulston.

1 Atk. 193.

"But in this case it must appear that the departure was for the purpose of delaying or defrauding creditors; but if it appears that in fact they are delayed by such departure, it will be the same as if the first departure was fraudulent."

Cited in Degolls v. Ward.

Hill. 12 G. 2.

Bull. N. P. 39.

Raikes v.

Porcau.

Sitt. Trin. 26

6. 3.

Cook B. L. 95.

S. P.

For where it appeared that the bankrupt had fled and gone abroad for killing his wife, Ch. Just. *Reeves* held, That shewing *quo animo* it was done, might prevent such departure from being construed an act of bankruptcy; but it appearing in fact that by such departure the creditors were delayed and defrauded, he then held it an act of bankruptcy, though this case might also fall under the second description of acts of bankruptcy, viz.

2. By stat. 34. c. 35 *H. 8. c. 4.* it is enacted, "That withdrawing out of the king's dominions into foreign parts, with intent there to remain and so defraud creditors, and not returning within three months after proclamation, is an act of bankruptcy."

So that under this statute a person departing the realm with the consent of his creditors may be a bankrupt, by remaining abroad, though under the former he could not.

3. A third act of bankruptcy is by stat. 13 *Eliz. c. 7.* and 1 *Jac. I. c. 15.* which enacts that, "Beginning to keep house, so that he cannot be seen or spoken to by his creditors, is an act of bankruptcy."

Under this statute it has been held,

1. "That a trader ordering his clerk or servant to deny him to a creditor, is not an act of bankruptcy, for there must be an actual denial."

Hawkes v.

Saunders

Trin. 24 G. 3.

Cook B. L.

4.

For where a trader gave orders to his servant to deny him to his creditor on the 26th of May, but he was not actually denied

denied till the 28th to a creditor, it was adjudged, That the actual denying, not the order to deny, constituted the act of bankruptcy; so that he was only a bankrupt from the 28th.

2. But being denied when at home, though not itself an act of bankruptcy, yet is evidence of it; but in such case it must appear that the denial was *with intent to delay creditors*: for if the party be ill in bed when denied, or the creditor calls at an unseasonable hour of the night, or he is in company, such will be no act of bankruptcy. Bull. N. P. 39. Per Lord Hardwicke. Atk. 201.

3. And on the same ground where the person was denied by agreement, in order to ground a commission on it, Ch. Just. *Lee* held it not to be an act of bankruptcy. Field v. Bellamy. Hill. 15 G. 2. Bull. N. P. 39.

Though here, where the case was, that the party (in consequence of an agreement made at a meeting of the creditors two hours before (at which he and the plaintiff were both present) was denied to the plaintiff's clerk who came to demand money, *Justice Foster* held this to be a sufficient act of bankruptcy. But Judge *Buller*, in his *Nisi Prius*, puts this with a *quere*. Perhaps the distinction may be, that the parties who have so concerted the act of bankruptcy cannot afterwards say, that the commission was fraudulently taken out: but such act would be sufficient for persons not privy to it. Bromley v. Munday. G Hall, 2d June, 1756. Bull. N. P. 39.

And it was ruled in this case by Mr. Just. *Buller*, at *Guildhall*, according to that distinction; the action was *trover*; for goods taken in execution; and the question was on the time of committing the act of bankruptcy: he ruled, That if a man leagues with some of his creditors, and keeps house with intent to commit an act of bankruptcy, and is accordingly denied to one of such creditors, it is a fraudulent act of bankruptcy, and will not support the commission: but if the creditor calling be not a party to nor acquainted with such agreement, it shall not operate to his disadvantage; and the denial will be good evidence of an act of bankruptcy. Cowley v. Hopkins. Sitt. Mich. 1785. Cook B. L. 105.

And where *bring denied* is the act of bankruptcy relied on, circumstances may be shewn that he *did not do it to avoid payment*, but on account of sickness or particular business. Burr. 484.

4. "So the denial must be *to a creditor*."

For though a man, with intent to delay his creditors, orders himself to be denied, yet unless he in fact be denied to a creditor it is no act of bankruptcy; therefore it is necessary to prove that the person denied was a creditor. Jackman v. Nightingale. Patch. 13 Geo. 2. Bull. N. P. 40.

And

Barrow v.  
Forster.  
Per Lord  
Camden,  
Norwich Sum.  
Aff. 1765.  
Green's Bank-  
rupt Law, 45.

And in this case it was held, That being denied to a person who came on behalf of a creditor was not sufficient, though it was given in evidence that the bankrupt was afterwards denied to many creditors, and so continued to be till the commission was sued out.

But a clerk calling with a bill of the house to which he belongs, is a sufficient creditor within the meaning of these cases, as I have often seen in practice.

Per Ld. Talbot,  
7 Vin. Abridg.  
61.

5. And so therefore it must appear that a *debt is actually due*; as if a creditor by *note payable at a future day* calls, being denied to him, is not an act of bankruptcy, as he is not *then* a creditor.

Mosely 3.  
7 Vin. Abridg.  
6. pl. 12. in  
marg.

6. But a *banker's* stopping or refusing payment is not an act of bankruptcy, for it is not within the description of any of the acts of bankruptcy, and there may be good reason for doing so; as suspicion of forgery or the like. And if in consequence of that refusal he is arrested and puts in bail, it is no act of bankruptcy.

4. "Departing from his dwelling-house, or otherwise absenting himself, is another act of bankruptcy by stat. 13 " *Eliz. c. 7. and 1. Jac. 1. c. 15.*"

Maylin v.  
Eyles.  
2 Stra. 309.

1. As where it appeared that the bankrupt had gone out of town on the morning of the 28th of *November* and returned in the evening, before which time a bailiff had been at his shop to arrest him, and the next morning he sent for the bailiff and told him, that he had gone out of town that day in order to get the term of the plaintiff; and now that the return of the writ was out, that if he would take out a new writ, that he would give bail; which was done accordingly. This was held to be clearly an act of bankruptcy, being a departing from the house with intent to *delay and defraud a creditor.*

Com. Dig. 523.

2. "But the absenting himself must be to avoid the *payment of a debt.*"

For if a man absents himself for fear of being arrested by an *attachment out of chancery*, for *non-payment of money* decreed, that will make a man a bankrupt.

Ibid.

But if a man absents himself for fear of being arrested by a *capias de excommunicato capiendo*, that will not make him a bankrupt.

Lingoqd v.  
Eade.  
1 Atk. 196.

So in this case Lord Ch. Just. *Willes* was of opinion, That a person's absconding to avoid an *attachment for non-performance of an award*, in not delivering goods in pursuance of the award, was not an act of bankruptcy, for it was no within



within the words of the stat. 1 Jac. 1. c. 15. which makes it an act of bankruptcy in a person to keep out of the way or depart from his dwelling to avoid the payment of a just and true debt, but the delivery of goods was rather a duty; and Lord Hardwicke afterwards recognized this distinction between a debt and a duty, as the true one.

3. So the absenting himself must be *voluntary*; which if done but for a single day, for the purpose of delaying his creditors, it is an act of bankruptcy; but if the *departing was involuntary*, as under an arrest, such is not an act of bankruptcy. *Phillips v. Sheriff of Essex*, Green B. L. 53.

5. "Another act of bankruptcy is, being arrested for debt and lying in prison two months on that or any other arrest or detention for debt, which makes him a bankrupt from the time of the first arrest: or willingly and fraudulently procuring himself to be arrested." By stat. 1 Jac. 1. c. 15. § 21. Jac. 1. c. 19.

Under this part of the statute it has been held,

1. The *arrest must be lawful*, therefore an arrest by an executor before probate, is not an act of bankruptcy. 3 Lev. 58.

2. That though the words of the statute are, that he shall be a bankrupt from the time of the first arrest, yet that if a trader is arrested and puts in good bail, but afterwards surrenders himself in discharge of his bail, he shall only be a bankrupt from the time of his surrender. *Came v. Colman* Salk. 109. *Tribe v. Webber* Hill. 17. *Geo. 2. C. B.* Bull. N. P. 38. S. P.

But where *sham-bail* is put in before a judge as a means to get defendant turned over to the prison of the court, and he is so instantly surrendered by his bail, this shall be considered a mere evasion and a continuation of the first arrest; and the bankruptcy shall relate to the first arrest. *Rose v. Green*, Burr. 437. Bull. N. P. 39. S. C.

3. It has been decided in one case, that lying in prison two lunar months will make the party a bankrupt from the time of the first arrest; and though the commission was taken out before the two months expired, yet he appearing to be a bankrupt by relation to a time before the suing it out, it was held sufficient. *Hope v. Gill*, Beawes 489. Cit. Cook B. L. 121.

2. To make the *procuring one's self fraudulently and willingly to be arrested* an act of bankruptcy, it must be on a feigned action or a sham-debt. 1 Burr. 439. Com. Dig. 523.

6. Another act of bankruptcy is "After having been arrested, *escaping* where the debt is 100l. or suffering himself to be outlawed." By stat. 21 Jac. 1. c. 19.

1. But an escape to become an act of bankruptcy under this clause in the statute, must be against the consent of the sheriff. *Ld. Mansfield* 1 Burr. 440.

*sheriff or officer*; such an escape as is criminal, which shews the party intended to run away and defraud his creditors; not a constructive one, as being out of the sheriff's bailiwick, in passing through a different county in the custody of the sheriff.

Rose v. Green.  
1 Burr. 437.

As where the person was arrested in *Kent*, and was brought up by *habeas corpus*, in order to be turned over; and on the road to the Judge's chambers, was permitted at his own desire to call at his attorney's house in *London*, which was out of the county of *Kent*; he was from thence carried to a judge's chamber and there bailed, and then surrendered: it was held, That this was no *escape* within the meaning of the statute.

Croxtan v.  
Hodges, per  
Fortescue at  
Hereford. 4  
Geo. 2.  
Bull. N. P. 40.

2. But under these several clauses of the different statutes with regard to acts of bankruptcy created by arrests, it is to be observed, that a person's giving money for notice when a writ comes into the sheriff's office against him, is no proof of an act of bankruptcy: for he may do it to prevent his credit from being blown.

7. By stat. 1 Jac. c. 15. "Willingly or fraudulently procuring his goods or chattels to be sequestered or attached, is another act of bankruptcy."

Per Ld. Mansfield.  
Cowp. 428.

The word *attachment* being coupled with sequestration and arrest, means that sort of attachment and sequestration which it is the custom of *London* and other cities to use.

Com. Dig. 523.

But this attachment or sequestration must be *by his own procurement*; for it is no act of bankruptcy if done without his knowledge.

Harman v.  
Spotswood.  
Mich 3 Geo. 3.  
B. R. Cook  
B. L. 126.

Therefore in an issue out of Chancery, to try the time of a bankruptcy, the case was, *Gray* the bankrupt had borrowed money of *Spotswood*, the defendant, upon a bond and warrant of attorney; *Spotswood*, entered up judgment and sued out execution, which was executed the 5th of *April*: the transaction was however kept secret, and the officer in possession appeared to be an indigent relation of *Gray's*, who carried on his business as a coachmaker till the 25th of *May*, when he was arrested, and then an inventory was made out and the goods sold, the money remaining in the sheriff's hands: during the time the bankrupt remained in possession he contracted large debts and paid to the defendant on divers accounts 1390l. which was more than double the debt on the judgment, that being only 500l.: it did not appear in evidence that the judgment was entered up, or the execution sued out at the instance of the bankrupt: the court were of opinion (the jury having found that the debt was *bona fide* and

and the execution adverse) that the execution could not be deemed an act of bankruptcy.

8. "Another act of bankruptcy is suffering himself to be outlawed." By stat. 1 Jac. 1. 15.

But an outlawry in *Ireland* does not make one a bankrupt here, though an outlawry in *Durham* does. Cook B. L. 196.

But to make an outlawry an act of bankruptcy, it must appear to be suffered with an intent to defraud creditors. Radfords v. Bludworth. 3 Lev. 13.

9. By stat. 1. Jac. 1. 15. "it is further enacted as an act of bankruptcy, "For a trader to yield himself to prison."

This means a voluntary yielding for *debt*; and if a person capable of paying, will notwithstanding, from fraudulent motives voluntarily go to prison, it is an act of bankruptcy.

Therefore where a trader was arrested for 28<sup>l</sup>. and having sufficient to pay it; yet chose rather to go to prison, in order, as he said, to compel his creditors to come to a composition, the Chancellor said, This is an act of bankruptcy within 1 Jac. 1. though without such *intent*, yielding himself to prison was no act of bankruptcy, unless he lay two months: otherwise where the party procures himself to be arrested for a sham debt, for that by stat. of *Eliz.* is not an act of bankruptcy. Ex parte Burton. Vin. Abr. title Creditor, 62.

10. Another act of bankruptcy is under stat. 1. Jac. 1. c. 15. "Making any fraudulent grant or conveyance of his "lands, tenements, goods, or chattels."

Under this statute it has been held,

1. That the conveyance which shall be an act of bankruptcy under this head must be *by deed*; and a *fraudulent judgment and execution*, though void against creditors, is not an act of bankruptcy. Clavey v. Hayley, Cowp. 427. Martin v. Pewsnefs. 4 Burr. 2478.

2. Every assignment by a trader who becomes insolvent is not an act of bankruptcy; for a bankrupt may lawfully prefer one creditor to another, as he may make a mortgage to him; but it *must be with possession delivered*, except in the case of a ship at sea. So the bankrupt may assign over *part* of his property to a fair creditor in discharge of his debt, and it shall be good. Wilson v. Day. 2 Burr. 827.

As where *Hooper* the bankrupt, being fairly indebted to the plaintiff, who was his mother, in 800<sup>l</sup>. but finding himself declining, before any act of bankruptcy, assigned to her a parcel of silks, amounting to about 350<sup>l</sup>. which was about *half his stock in trade*: of this he made a bill of parcels with a receipt, as if sold in the ordinary course of trade, and afterwards conveyed the goods to her. In the evening Hooper v. Smith 2 Black Rep. 441.

of the same day, it was agreed that he should deny himself, and so become a bankrupt. The assignees having possessed themselves by stratagem of the silks so assigned to her, she brought *trover*, and the question was whether the assignment was an act of bankruptcy, and fraudulent? The doctrine laid down by Lord *Mansfield* was, That if a man having previously committed an act of bankruptcy, in order to pay even a just debt, *assigns all effects* to the creditor, or all to several creditors, in *exclusion of any one or more*, that *that* is an act of bankruptcy; but that a preference by assignment to one creditor of *one part* of his goods, and that to pay only part of the debt, has been frequently held good. Though if a man makes over so much of his stock as disables him from being a trader, it would be fraudulent; but to say that *this part* of the stock would have that effect, would be going too far.

The doctrine here laid down has been confirmed by many cases. As,

*Assignees of  
Sladers v.  
Demattos.*  
1 Burr. 567.

1. An assignment by a trader before an act of bankruptcy, *of all his property, real and personal*, though given by way of security, and for a valuable consideration, was in this case adjudged to be a fraud on the bankrupt laws, and an act of bankruptcy.

*Law v. Skinner.*  
2 Black. Rep.  
996.

2. The bankrupt in this case assigned in consideration of 300l. two leasehold houses and *all his stock in trade* to the plaintiff to secure that sum, but *the household goods and debts were not included*, the mortgage was forfeited, and in consideration of 40l. he bargained and sold his household goods, *but not the debts* (which were trifling) *to the plaintiff to secure the 340l.* The assignees took possession of the goods, on which the plaintiff brought *trover*, and on a special case made, the court determined that the assignment was an act of bankruptcy, for it being of all his stock in trade, he could not carry on business longer.

*Gayner's case*  
cited.  
1 Burr. 477.

3. An assignment of the bankrupt's property *to the exclusion of any of the creditors*, is an act of bankruptcy. As was held in this case where one *Gayner* a trader, on the 7th of *June*, made an assignment of all his effects, goods, stock in trade, &c. (except his household furniture, watches, plate, bills, and cash then by him) to trustees, in trust to pay themselves, and all the rest of the creditors, except *Ford* the petitioner; the trustees declining to act under this assignment, he executed another on the 9th of *June*, wherein the trustees were to pay themselves and all the creditors mentioned in the schedule (in which schedule *Ford's* name was not omitted).

ted) and in this assignment a large parcel of ginger was accepted. On this coming before Lord *Hardwicke*, he was clearly of opinion that the deed of the 9th of *June* was of itself an act of bankruptcy.

But how far a *general assignment* to trustees for the *benefit of all the creditors* of the bankrupt is an act of bankruptcy, this case following goes some length to decide.

In trover against a sheriff who had levied an execution on the bankrupt's goods; to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an assignment made by the bankrupt of all his effects to two of his creditors, in trust for themselves and the rest of the creditors, in consequence of a proposition made by the bankrupt at a meeting of his creditors, and accepted by all present. *Per Lord Mansfield*, this deed is a fraud on the bankrupt-laws, and is an act of bankruptcy, unless every creditor concurred, which here is not the case, the plaintiff in execution being adverse.

*Kettle & al. Aff. v. Hammond. Sittings after Hil. 7 Geo. 3. Bull. N. P. 40.*

4. But it should seem that those partial assignments must be made only with a view to satisfy the creditors to whom they are made, for if done *for the purpose of defrauding the other creditors*, and to give an undue preference, or made under circumstances when the trader cannot longer stand his ground, they are fraudulent, and acts of bankruptcy.

Therefore, where the defendants, who were mercers in *London*, on the 7th of *April* sent goods to the bankrupts, down into the country, and gave them credit for them in their books: on the 18th of *May*, the bankrupts, without the knowledge of the defendant, sent the same goods to a third person for the use of the defendants; and on the 4th of *June* became bankrupts: on the 6th of *June* they wrote to the defendants, informing them that their affairs being declining, that they had so disposed of the goods for their use. This letter was received on the 13th of *June*, and on the 9th this commission had issued: immediately after receiving the letter, the defendants signified their assent to it: on *trover* by the assignees, it was held, That the debt due was a good consideration; for thus transferring the goods was good as a satisfaction of debt, and that the property thereby passed out of them, and reverted in the defendants until they shewed their dissent, which should not be presumed, it being for their interest; so that they might hold them against the plaintiffs (the assignees).

*Atkins v. Barwick. 1 Sura. 165.*

But where a trader *being in insolvent circumstances*, and unable to pay more than eight shillings in the pound, made an assignment, *in contemplation of a bankruptcy*, of a lease to certain

*Devon v. Watts. Dougl. 86. Linton v. Bartlett 3 Will. 47. S. P.*

certain of his creditors, this was adjudged to be an act of bankruptcy, though it was an assignment of but *part of his property*.

Harman v.  
Fisher.  
Cowp. 117.

So where the defendant having, in order to support the credit of the bankrupt's house, immediately before its stopping lent the bankrupt 500*l.* and he, on the evening before he absconded, inclosed bills to the defendant to the amount of 500*l.* in a letter, in which he mentioned his having done so, as conceiving him *intitled to a preference*, the money was recovered back from him, by the assignees.

“ The court therefore allows no evasion of the statute.”

Rust v. Cowper.  
Cowp. 629.

As where the bankrupt made a *pretended sale* of part of his effects to his creditor, but which were *not in the way of the creditor's trade*, nor was there *any application or pressing for payment of the creditor*, but done by the bankrupt to give him a preference, it was held to be fraudulent. *Vid. Atkins v. Barwick, ante 559.*

Hague v.  
Rolleston.  
4 Burr. 2174.

And even if the assignment is in the way of the creditor's trade or business, yet if it is done *in contemplation of a bankruptcy*, it is void.

Alderson v.  
Temple.  
4 Burr. 2235.  
S. P.  
Thompson v.  
Freeman.

1 Term Rep.  
155.

But if a trader, being fairly indebted and *apprehensive of being sued*, before any act of bankruptcy, assigns over to his creditor part of his property, though in fact his *apprehensions are groundless*, yet is the assignment good.

II. “ Obtaining any protection otherwise than being lawfully protected by privilege of parliament, is another act of bankruptcy.” By stat. 21 Jac. I. c. 19.

Of this sort was the entering into the service of an ambassador. But now, by stat. 7 Ann. c. 12. it is enacted, “ That any person being a merchant or trader, who shall go into the service of any ambassador or foreign minister, shall not have any privilege.”

Skinn. 21.

But if any one be protected as a King's servant, it is not an act of bankruptcy.

Vernon v.  
Hankey. Sitt.  
G. Hall. Tr. 27  
G. Gooke B. L.  
125.

10. Another act of bankruptcy is “ Paying to the petitioning creditor, or delivering to him goods or security for his debt, whereby he shall have privately more in the pocket than other creditors.” By stat. 5 Geo. 2. 30. § 19.

II. “ Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after the service of legal process, upon any trader having privilege of parliament.”

"*ment*, is another act of bankruptcy." By stat. 5 Geo. 2. c. 30. § 24.

But it is further enacted by statute 4 Geo. 3. c. 33. § 1. "That before any commission can be sued out against a member of parliament, it is required, That the creditor make and file on record in one of the courts at *Westminster*, an affidavit, that the debt is justly due to him, and that his debtor, as he verily believes, is a merchant, &c. and within the description of persons who are objects of the bankrupt laws."

And note, That if a man commits a *plain act of bankruptcy*; as keeping house, &c. though he afterwards goes abroad and is a great dealer, yet that will not purge the first act of bankruptcy. But if the act is doubtful, then going abroad and dealing will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy: also, if after a plain act of bankruptcy he pays off or compounds with his creditors, he is become a new man.

Therefore where a trader was denied to a creditor who called in the morning with a bill for payment, though by the custom of the city he had till five o'clock in the evening to pay it, and in fact did pay it in the course of the day, yet it was resolved, That having committed an unequivocal act of bankruptcy by the denial, it could not be purged or explained away by any subsequent circumstances.

Hopkins v. Ellis. Salk. 110.

Colkett. aff of Falch v. Freeman. 2 Term Rep. 39.

3. The next thing to be considered is,

### The Debt of the Petitioning Creditor.

1. By stat. 5 Geo. 2. c. 30. it is enacted, "That no commission of bankruptcy shall be sued out upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners petitioning for the same, does amount to 100l. or upwards; or unless the debt of two creditors amount to 150l. or of three or more creditors to 200l. and the creditor or creditors petitioning for such commission shall, before the same shall be granted, make oath of the truth and reality of such debt."

1. In this case the bankrupt was fairly indebted to the petitioning creditor in upwards of 100l. but before the commission sued out, he had given to the creditor a bill of exchange, which reduced the debt to within 100l. but this bill of exchange was drawn on a person with whom the bankrupt had no dealing, and which was of course *not accepted*: the petitioning creditor kept the bill, and gave no notice to the bankrupt

Bickerdike v. Bolman. B. R. 1 Term Rep.

*of the non-acceptance*, and sued out the commission on the whole debt: in an action in which the bankruptcy came in question, it was insisted, that the petitioning creditor having neglected to give notice of the non-acceptance of the bill, *had by his laches made it his own*, and that therefore the petitioning creditor's debt being less than 100l. that the commission was irregular; the point being reserved, the court was of opinion, That the bill being drawn on a person who had no effects of the drawer in his hands, that the notice of non-acceptance was unnecessary, as he never could sustain an injury for want of notice, and that so there could be no extinguishment of the amount of the bill of exchange; and that the petitioning creditor's debt was therefore sufficient.

2. "Under this statute the petitioning creditor's debt must be a legal one."

Meddicott's case in banc.  
2 Stra. 899.

For where the petitioning creditor's debt was *as assignee of a bond due by the bankrupt*, the commission was superfeded; for he was only an *equitable creditor*.

Ex parte Hylliard.  
1 Atk. 147.

So where one *Alfworth* entered into an agreement to purchase from *Hylliard* an equity of redemption of an estate then in mortgage, for which he was to give 400l. and articles were signed accordingly. *Alfworth* paid 250l. and was to pay the other 150l. on the execution of the conveyances, but *Hylliard* refused to complete the purchase, upon which *Alfworth* sued out a commission of bankrupt on the debt of 250l. On a petition to superfeed it, Lord *Hardwicke* doubted, whether a commission could be taken out on such a contract; for the remedy should have been a bill for the performance of the contract, and no action could in strictness of law be maintained. But it appearing that since the issuing of the commission, *Alfworth* had taken an assignment of the mortgage, which he could hold till satisfied, he ordered the commission to be superfeded.

3. The debt must be a legal and good debt *for which an action can be maintained*."

Barnaby's case.  
1 Stra. 653.

For where a judgment had in this case been recovered against a bankrupt, he was surrendered by his bail, and then charged in execution; after which the plaintiffs in that action sued out a commission of bankrupt, grounded on the debt for which the judgment had been obtained: the commission was superfeded, the body of the debtor being in law a satisfaction for the debt.

Caf. K. B. 243.  
Swayne v. Wallinger.  
2 Stra. 746.

So a man cannot be a bankrupt for a debt contracted during his infancy, though the act of bankruptcy was after he came of age.

"But



"But a debt barred by the statute of limitations may be a good petitioning creditor's debt."

This is to be taken with this restriction, that such debt will be an insufficient one to support the commission, if the objection comes from the bankrupt himself; who on such ground may supersede the commission; but the objection that the debt was barred by the statute of limitation, will not lie in the mouth of a person sued by the assignees; for the debt is not extinguished by the limitation, and the bankrupt has acquiesced in it: neither will the court presume a debt to be barred though six years have elapsed. Quantock v. England  
2 Burr. 2628.

And accordingly Lord Mansfield at *Nisi Prius*, ruled, That the statute of limitations does not prevent the creditor from taking out a commission of bankruptcy, but extends only to remedy by action mentioned in the statute, but does not extinguish the debt or take away any other remedy. Fowler v. Brown.  
Sitt. Mich. 177.  
Cooke B. L. 12.

So where the debt due to the petitioning creditor was by bond, which was not due at the time of suing out the commission, the debt was held to be a bad one to support the commission. Ex parte James.  
1 P. W. 610.

This case was prior to the statute 5 Geo. 2. c. 30. which now allows creditors to the bankrupt by bills, bonds, or promissory notes payable at a future day, to petition for, or join others in petitioning for, a commission of bankruptcy.

4. "The debt must be a subsisting debt at the time of the act of bankruptcy committed." Vid. Green's  
Bank. Law.  
80 contra.

For where in this case the petitioning creditor's debt was under a note drawn by the bankrupt after an act of bankruptcy committed, the commission was superseded, the debt being a bad one. Toms v Mitton.  
2 Stra. 744.

But where the petitioning creditor's debt was a note of 200l. given by the bankrupt to A. B. before any act of bankruptcy, but indorsed by A. B. to the petitioning creditor after an act of bankruptcy committed, the debt was held to be sufficient to support the commission, the debt being due by the bankrupt when he became so. Anon.  
2 Willf. 135.  
Ex parte Thomas.  
1 Atk. 73.

The authority of this case was confirmed by a subsequent one of *Bingley v. Maddison*. Cooke B. L. 22.

So where the bankrupt was indebted to the petitioning creditor by simple contract, and after a secret act of bankruptcy committed, gave him a bond for the money, it was held, That the bond did not so destroy the simple contract debt, but Ambrose v. Clendon.  
2 Stra. 1042.

but that it was a good debt whereon to ground a commission.

5. "But the debt on which the commission is grounded, need not have been *contracted during the time that the bankrupt carried on trade.*"

*Butcher v. Easto.*  
Doug. 282.  
1 Sid. 411.

For a debt contracted *before a man entered into trade*, will be a good one to support a commission,

And therefore that resolution, That a trader cannot be bankrupt for a debt contracted after he has left off trade, though he afterwards becomes a trader again, seems not to be law, since by the case of *Butcher v. Easto*, it is indifferent at what time the debt has been contracted.

*Sir R. Cotton & al. v. Dainty and Sir And. Bateman.*  
1 Sid. 411.

But where a *man has quitted trade*, he shall not be liable to be made a bankrupt on account of his former trading, for after-contracted debts; though for a debt contracted during the trading he may, and even though after quitting trade he sells his remaining stock.

*Ray aff. of Larkins v. Clerk.*  
G. Sitt. Hill.  
1775. MSS.

Where the petitioning creditor was *the administrator of the obligee of a bond given by the bankrupt*, but the bond had been given in the year 1765, the act of bankruptcy in 1773, and the letter of administration granted in 1775; this being subsequent to the act of bankruptcy, it was contended could not support the commission; but Lord Mansfield over-ruled the objection; for the intestate and administrator are *una eademque persona*: and so the debt was due to the petitioning creditor before the act of bankruptcy.

*Meggott v. Mills.*  
2 L. Raym. 227.  
12 Mod. 159.

And therefore where a trader was indebted while in trade in 100l. and then quitted trade, and became indebted to the same creditor in another 200l. he afterwards paid 100l. to his creditor, without saying upon what account; *Holt. Ch. Just.* said, That it would be too rigorous not to allow this payment to be appropriated to the 100l. debt contracted while the debtor was in trade, so as to suffer him to be still liable to a commission of bankrupt: but he gave no absolute opinion on it.

6. In general, the following have been allowed to be good petitioning creditors debts, to support the commission:

*Per Id. Hardwicke.*  
1 Atk. 241.

1. An arbitration bond; for it is a debt at law, and binds the parties till set aside for corruption or partiality; and therefore may well support a commission.

*Ex parte Lee.*  
1 P. W. 782.

2. The petitioning creditor's debt in this case amounted to 100l. but it was in notes of the bankrupt, bought in at a *public*

*shillings in the pound*; it was held to be a good debt to support the commission, though it had been otherwise in the case of a bond.

3. Where an order was made that a solicitor's bill should be referred to a Master to be taxed, and that *all proceedings at law should in the mean time be stayed*, and while the bill was under taxation the solicitor sued out a commission *for the debt due by his bill*; on a petition to supersede it, it was held to be not a sufficient reason to supersede the commission; for the order for taxation extended only to the bringing of actions at law, and the other ordinary proceedings. Anon. Mosely 27.

4. A commission may issue *against one partner for a debt due by the partnership*. *Vid. Cooke B. L. 18, & cas. ibid. cit.* Ex parte Grisp. 1 Atk. 134.

5. *The executor of a bankrupt cannot sue out a commission grounded on a debt due to his testator, unless the commission against his testator has been superseded*; for all debts due by him belong to his *assignees*. Ex parte Goodwin. 1 Atk. 100.

### The Commission.

4. The *Commission* is next to be proved; which is done by producing it under the great seal, and the petition to the Chancellor on which it was granted.

5. The next thing requisite to be proved in actions by the *assignees* of the bankrupt, is

### The Assignment.

This is to be done by producing the deed itself, and proving the execution of it by the commissioners by the subscribing witnesses.

6. The last thing to be considered under this head, is

### Property in the Bankrupt.

This includes every thing of which he is the visible or real owner; every thing of which he has the actual possession, or of which he has parted with or lost the possession after an act of bankruptcy committed, or in contemplation of it.

# 1. Of Things of which he has Possession, or is the Real or Visible Owner.

1. To prevent a trader from injuring others, by deriving a credit from an appearance of stock or property which is not his own, it is enacted, by stat. 21 Jac. 1. c. 19. § 11. "That if any person shall at the time of his becoming a bankrupt have in his possession, order, or disposition, by consent of the true owner, any goods whereof he is the reputed owner, that the commissioners shall have power to sell the same."

Under this statute it has been held,

*Ryall v. Rolle.*  
1 Atk. 165.  
1 Will. 260. 1. That it extends to mortgages, or conditional sales as well as to absolute ones; so that where in this case a trader had mortgaged his goods, stock in trade, &c. and the mortgagee suffered him to remain in possession, this mortgage was adjudged to be within the statute, and void as against creditors; who recovered the goods and stock accordingly.

s. c. 2. That it extends to choses in action; as bonds, profits in trade, &c.

s. c. 3. That though the mortgage is to a partner, who thereby is in possession, yet that the mortgage is void within the statute, if such partner allows the mortgagor to continue in possession, and appear still as a partner; for the opportunity of fraud is the same, and it is within the mischief of the statute.

2. "But the statute does not extend to assignments of ships or cargoes at sea."

*Brown v. Heathcote.*  
1 Atk. 160.

For where *Williams* and *Wilder*, being partners, assigned to *Heathcote*, to whom they were indebted, two ships, together with the bills of lading, and policies of insurances on the goods on board; *Williams* and *Wilder* became bankrupts, and the assignees brought their bill against *Heathcote*, grounding themselves on the statute 21 Jac. no possession having been delivered: but Lord *Hardwicke* was of opinion, That the statute extended only to cases where the assignee could obtain possession of the goods assigned, but which he left in possession of the assignor, and so gave him a false credit; which case did not hold here, the ships being then abroad on their voyage.

*Atkinson v. Mallings.*  
2 Term. Rep. 462.

In such case of the assignment by mortgage of a ship, the delivery of the grand bill of sale is a complete transfer of the property in the ship; and such delivery is good within the statute.

"But

" But the creditor or purchaser should take possession of the ship as soon as possible; for the delivery of the grand bill of sale will not be sufficient, if there was an opportunity of taking actual possession, and neglected." Cooke B. L. 380.

For where *Wm. Tappenden*, being indebted to the plaintiff in 1400l. for securing the payment, mortgaged to him some leasehold estates, wharfs, and *three hoys*; but he *kept possession of the hoys*, and soon after became bankrupt: the assignees got possession of the hoys; upon which the plaintiff filed his bill to compel the assignees to redeem the hoys, or that they might be sold to pay his demands: Lord *Talbot* dismissed the bill as far as respected the hoys; the assignment being void under statute *Fac.* and ordered them to be sold for the benefit of the creditors. Stephens v. Sele. 1 Ves. 352. Hall v. Gurney. Hill. 24 G. 3. Cooke B. L. 580. S. P.

3. " Neither does the statute extend to cases of goods sold by the bankrupt, of which he has only the temporary possession after the sale."

For where *Matthews* the bankrupt, having 500 barrels of tar, sold two-thirds of it to *Flyn and Field*, and it was agreed that *Matthews* should also send to them the other third on his own account, but that he should be at the expence of cartage, portorage, and shipping, and that he should lodge all the tar in a warehouse of his own till an opportunity of shipping it offered, there being none at that time; the tar was accordingly lodged in *Matthews's* warehouse; *Flyn and Field* paid for their part: *Matthews* became a bankrupt, and the tar was taken possession of by his assignees; but Lord *Hardwicke* held this not to be a case within the statute; for the words of the statute are " goods left in the possession, order, and disposition of the bankrupts;" which these could not be said to be, being merely temporary, and for a particular purpose. Ex parte Flyn & Field in re Matthews. 1 Atk. 185.

4. " So neither does the statute extend to cases in which the bankrupt has not the order and disposition of the goods claimed."

For where the commissioners of the victualling office, having occasion to erect a stage at *Weevil*, in *Hampshire*, for shipping barrels, and published an advertisement for carpenters to send in proposals; *Forbes* was disposed to take the contract, but being a general merchant, could not do it in his own name; he therefore agreed with *Kent* the bankrupt, who was a carpenter, that he should take the contract, for which he was to have one-fourth of the profits, and a guinea a week for superintending the work, and the rest was to be owing to *Forbes*: the contract was accordingly so made, and the timber was bought by *Forbes*, and shipped in his name, and Collins Aff. of Kent v. Forbes. 3 Term Rep. 316.

and delivered into the king's yard as for *Kent's* use, and received as such by the king's officers; they swore that they should not have received it on account of any other person, nor that they would have permitted *Kent* himself to dispose of it in any other manner than for the work contracted for, except such parts as were unfit for the purpose, as they considered it as delivered for the purposes of the contract. Before the work was finished *Kent* became a bankrupt, and *Forbes* got possession of the timber; to recover which the action was brought. The court were of opinion, That this was not such a possession in the bankrupt as should entitle the assignees under the stat. 21 Jac. for the timber was the property of the defendant, to whom no fraud was imputable; there was no sale to *Kent*, nor any general delivery so as to give him the absolute disposition of it; for the officers of the yard would not have permitted him to have sold it to any other, nor to have used it, except for the purposes of the contract: this therefore could not enable *Kent* to get credit on this property; they therefore gave judgment for the defendant.

5. " And it seems to be admitted as a general rule, " That in all cases where the bankrupt has made any sale " or mortgage of any part of his property, of which possession could not then be given, that where the person to " whom such sale or mortgage has been made has an opportunity of taking possession of the property, and neglects " to do it, that he shall lose that equitable lien he is entitled " to as against the property; but that where he uses every " means to acquire the legal possession, that in that case he " shall be entitled."

*Lempriere v.*  
1 *Asley*.

2 Term Rep.  
482.

*Faulkner v.*  
Case. cit.

2 Term Rep.  
491.

1 Brown. 125.

For where *Syeds* the bankrupt having received advice from a correspondent in *America*, that a quantity of *Brazilletto* wood was about to be shipped on his account, he procured an insurance thereon, and then applied to the defendant *Pasley* to advance him a sum of money on the credit of the goods and the policy of insurance; *Pasley* agreed to lend the money, and the bankrupt, by a stamped instrument, bound himself to deliver to the defendant the *Brazilletto* wood, and also to deposit in his hands the policy of insurance and letter of advice, and to indorse and hand over to him the bill of lading when it arrived. The policy and letter of advice were deposited with the defendant; the bill of lading was also indorsed over when it arrived, but it was after *Syeds* had committed an act of bankruptcy; this was on the 2d of *February*, and the commission issued the 10th; the ship arrived in *April*, and the defendant got possession of the goods, for which the plaintiffs now brought trover; Mr. *Justice Ashburn* delivered the opinion of the court, That as between a person who has

an equitable lien, and a third person who purchases for a valuable consideration, and without notice, the equitable title, though prior, shall not over-reach the title of the vendee; for the title of him who has a fair possession, and an equitable title, shall be preferred to that of a mere equitable title; but as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing, without discharging the money due; the party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors trusted to a personal credit, but *he* to the thing; the assignees must stand in the place of the bankrupt, and take the thing subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. It might be great inconvenience to commerce, if it were to be laid down as law, that a man could never take up money on the credit of goods consigned till they actually arrived in port: there seems to be no inconvenience on the other side, nor can it be any inlet to fraud; for no person can be taken in to lend money on the credit of the cargo after the party has parted with all the documents, and delivered them to him who has the first lien.

6. "The statute extends as well to goods entrusted to the bankrupt by a third person, and of which by disposing of them he is the visible owner, as to cases where the bankrupt himself, being the original owner, remains in possession after having sold them; for the mischief is equal of creating a fictitious credit."

For where in this case, *Mace* the plaintiff kept a public-house, had a licence, and said she was married to one *Penrice*; she went to the excise-office, had his name entered in the books, with a note in the margin "*married*;" *Penrice* had the licence, and continued in possession of the house and goods from that time till he absconded, and so committed an act of bankruptcy: *Mace* the plaintiff claimed the goods in question; first, As under a bill of sale from *Penrice*; but afterwards as her own original property, and denied her being married to *Penrice*: the court were of opinion, That this was a possession of goods in the bankrupt within the statute of *Jac.* and the plaintiff was nonsuited. Mace v. Cadell. Cowp. 232.

So where *Bryson* being possessed of a dyer's plant, sold it to *Simpson* for 16*l.* 16*s.* 6*d.* *Simpson* gave *Bryson* two promissory notes in payment, dated 19th of January, 1780; one for the sum of 82*l.* 13*s.* 6*d.* payable the 4th of January, 1781; the other, for the same sum, payable the 6th of January, Bryson v. Wylie. Cooke B. L. 391.

*January, 1782; when the first note became due, Simpson was unable to pay it; and Bryson offered to take back the plant, and return the notes, and agreed to let him the plant at the rate of 5l. per ann. for the term of three years: to this proposal Simpson agreed, and a deed was accordingly executed, by which it was agreed that Bryson should let the plant to Simpson; and that if he should make default in any of the quarterly payments, or in the performance of any of the covenants, that the term granted should cease, and Simpson should deliver up the plant to Bryson. There was a memorandum at the bottom of the deed, that Bryson had put Simpson in full possession of the plant, by delivering to him a winch in the name of the whole. On the 5th of July, 1783, Simpson had a commission sued out against him; and the messenger took possession of the plant: the court held clearly, That this was a possession in the bankrupt, within the statute of Jac. and belonged to the assignees.*

“ But in such case the bankrupt must *appear as the owner*; “ for if from the nature of his business the presumption of “ the goods being his property is excluded, they shall not “ be liable to his bankruptcy.”

*L'Apostrie v.  
Le Plaistrier.  
1 P. Wms.  
318.*

As is the case of *goldsmiths and factors*, who do not deal on their own stock, but that of others: as in this case, which was trover against the assignee of one *Levi*, to whom before his bankruptcy the plaintiff *had entrusted a parcel of diamonds to sell*; on a case made, the court of *King's Bench* were of opinion, That the bankrupt having no more than a *bare authority to sell for his use*, that they were not liable to *Levi's* bankruptcy.

“ So in the case of *factors*, goods consigned to them merely “ for sale, are not liable to their bankruptcy.”

*Godfrey v.  
Furzo.  
3 P. Wms.  
185.*

For if a merchant consigns goods to a factor, and he becomes a bankrupt, the goods still remaining in his possession, they shall still be deemed the property of the merchant; and he may recover them in this action.

*Whitcomb v.  
Jacob.  
1 Salk. 160.*

So if the factor had sold the goods consigned to him, and received the money, and died indebted in debts of an higher nature, if it could be proved that the money so received had been invested in other goods, these shall be deemed to belong to the merchant's estate, not to the factor's; but if the money had remained in specie, it had belonged to the factor's estate, and gone to answer the debts of an higher nature; for the money has no mark to be followed by.

*Per Lord  
Hardwicke.  
1 Atk. 234.*

But where the factor had for the merchant's goods taken *notes*, instead of money, the court of Common Pleas held, That



That the merchant should have the notes, as they could be traced.

And so if a factor had sold the goods consigned to him, and become a bankrupt, the merchant must come in as a creditor under the commission; though if he had *laid out the money in other goods* for the merchant, the merchant shall have them: so if the factor had sold for payment at a future day, the merchant shall have the money.

Scott v. Salmon.  
Hill. 16 G. 2.  
C. B.  
Bull. N. P. 43.

As where the plaintiff, living in *Ireland*, employed *B.* in *London* to sell goods for him: *B.* sold them to *J. S.*; the plaintiff at the time was ignorant to whom they were sold, and *J. S.* was ignorant whose property they were; *B.* became a bankrupt, and *J. S.* paid the money to the defendants, his assignees: the plaintiff brought an action for the money against the assignees, and recovered; for though it was agreed, that a payment by *J. S.* to *B.* was a discharge for him against the plaintiff his principal, yet the debt was not in law to him, but to the plaintiff whose goods were sold; and therefore was not assigned to the defendants under the general assignment of all their debts, but remained due to *A.* as it was before; that being paid to the defendants who had no right to it, that it was a payment under a mistake, and so was recoverable from them.

Garret v. Cul-  
lum. E. 1708.  
Buller N. P. 42.  
last edit.

And where the factor had a *del credere* commission, the same point was decided by the chancellor.

Ex parte  
Murray.  
Cooke B. L.  
415.

"And the case is the same of goods which the bankrupt has in his possession, as *executor or administrator*, for the statute does not extend to these."

3 Run. 1369.

For where one *Marsh* died possessed of about 2000*l.* and some plate, leaving a widow and children, the widow married a man who became a bankrupt: the question was, Whether the assignees of the second husband were entitled to the plate which had been left in the possession of the bankrupt? Lord *Hardwicke* said, That it certainly was not within the statute; because the administratrix had them in *auter droit*, and the husband could have them in no better right, and therefore they could not belong to his estate.

Ex parte Marsh.  
1 Atk. 158.

7. "So that the criterion of what possession shall subject the goods of others in a trader's possession to his bankruptcy, is the exertion of any act of ownership unconnected with any circumstances of doubtful property, or the appearing to have such power and right."

Therefore, where a bankrupt was left in possession of his house and goods by his assignees, after obtaining his certificate, for the purpose of collecting his debts, and during that time

Walker v.  
Burnell.  
Doug. 303.

time traded for himself, it was adjudged, That this was not such a possession as should subject them to be taken by the assignees under a second commission.

Jarman v. Wol-  
lerton.  
3 Term Rep.  
648.

So where in trover by the plaintiff as trustee for the wife of the bankrupt, the case was, That on the inter-marriage of the wife, by deed made previous to her marriage, all the wife's stock in trade, as a milliner, book-debts and other effects of the wife, were assigned to the plaintiff in trust for her separate use; there was no schedule, but an inventory of the furniture; at that time and for some time after the marriage, she carried on business at a house apart from her husband, in *Welbeck-street*, but some time after, she removed to his house in *Marybone-street*, where he was a linen-draper; and carried on her business in a separate apartment: it appeared that the husband paid the rent of the house, and had been at the expence of fitting up the shop, but there was contradictory evidence as to the manner of the wife's carrying on her business, whether for her own separate use or not. The jury found that it was not carried on separately, and found a verdict for the defendant for the stock in trade; but for the plaintiff for the furniture: it was moved, to set aside the verdict as to the furniture, as being a possession under stat. of *Jac.* but the court refused it, they being of opinion, That there was not such an order and disposition by the consent of the true owner, as was within the statute; that the trustee was the legal owner, and he gave no consent for such purpose; and the wife's possession in the manner proved at the trial, was no evidence of fraud, for she was the agent of the trustee: an objection was made on the part of the defendant, that there was no schedule when the deed was made; but the court held, That there was nothing in the objection.

2. These are cases in which the bankrupt is in possession of goods at the time he becomes a bankrupt, and which are recoverable under the circumstances now mentioned; but goods of which he has not the possession, if they have got into the hands of others after an act of bankruptcy committed, are in like manner recoverable in this action. 1. For the assign-  
ment of the bankrupt's property has a relation to the act of bankruptcy, and the assignees stand in the bankrupt's place from that time; that is, the property is in them from that time, and they may maintain trover for all goods of the bankrupt of which others have obtained possession from that period.

Monk v. Morris.  
1 Vent. 193.

"And it makes no difference whether the property was in England or elsewhere, for it all belongs to the assignees, and is by them recoverable."

For where the defendants were considerable creditors of Hunter v. Potts. the bankrupt, and resided in *England* at the time of the bankruptcy; upon the issuing of the commission, *they knowing of its issuing*, sent out an order to their attorneys in *Rhode Island* in *America*, to attach property of the bankrupt's there; the attachments were made there, and the proceeds, amounting to 496l. remitted to the defendants in *England*; to recover which the action was brought: it was resolved, That by the bankruptcy the whole property of the bankrupt vested in the assignees, and that therefore it could not be attached by any creditor in *England*; and that whatever he received under such attachment, that he was liable to refund to the assignees. 4 Term 182.

But the person abroad who has so had the bankrupt's property recovered from him, is not on his coming to *England* liable to the assignees; for having parted with it under the coercion of a court of competent jurisdiction, that shall justify him in law. Le Chevalier v. Lynch. Doug. 170.

2. "Where the assignment of the goods is itself an act of bankruptcy, and so the goods assigned are recoverable in this action, has already been mentioned; where an act of bankruptcy has been committed, and any person obtains possession of them afterwards by any means, they are in like manner recoverable."

As where the bankrupt had been arrested on the 2d of May, and on the 4th was charged in execution: on the 17th of June a *fiery facias* issued against him to the defendant the sheriff, who on the 26th levied the money: on the 5th of July the commission was taken out on the act of bankruptcy of lying in gaol two months, after which the sheriff returned *nulla bona*, and the return was adjudged to be good; for by the relation the property was in the assignees from the 2d of May. Coppendale v. Bridgen. 2 Burr. 814.

So where the defendants, who were sheriffs of *London*, had seized the goods of the bankrupt, after an act of bankruptcy committed, but before a commission had been sued out: but before a sale, a commission had been sued out, and an assignment made, notwithstanding which the defendants sold them; they were held to be liable in trover. Cooper v. Chittenden and Blackikon. 1 Burr. 20. 1 Black. Rep. 65. S. C.

Or the action may be maintained against the plaintiff who sued out the execution as well as against the sheriff, if he can be proved a party to the conversion by giving bond to secure the sheriff, and so making the act his own. Rush v. Baker. 2 Stra. 996.

But to this there are two exceptions.

1. Where

Audley v. Hal-  
ley.  
Cro. Car. 148.

1. Where an *extent* issued on a *statute*, and the comisor became bankrupt after the execution of the extent, but *before the liberate*; in trover by the assignees against the defendant who had got possession under the liberate, the court held, That the property was divested out of the bankrupt by the extent, and that the goods were therefore not assignable. *Note*, The extent was of the 21st of *October*, the act of bankruptcy was on the 3d of *November*, the liberate was sued out on the 6th, and the commission issued the 8th of the same month.

1 Atk. 262.

2. The second exception is in the *case of the crown*, for the king is not bound by any of the statutes of bankruptcy, he not being named in them; so that he is not affected by the relation, but only by the *actual assignment*, which changes the property.

Brassey v. Daw-  
son.  
2 Stra. 978.

As where the bankrupt was indebted to the king, as collector of the *land-tax* for the precinct of *Aldgate*, and the commissioners of the land-tax issued their warrant and seized his effects after an act of bankruptcy committed; but the goods were not taken away till after the assignment under the commission; it was held, That the goods being in the hands of the crown from the time of the seizure, were not affected by the act of bankruptcy which preceded it.

Rex v. Crump &  
Hanbury.  
Parker's Rep.  
126.

So where one *Edward Lewis* was indebted to the king by bond, dated the 3d of *March* 19 Car. 2. an extent issued upon that bond tested the *same day with the date of the assignment* under a commission of bankruptcy against *Lewis*; when it was held, That the extent should be preferred.

Stracey v.  
Hulse.  
Doug. 395.  
Rex v. Fow-  
ler &  
Attorney Gene-  
ral v. Senior.  
Ibid. S. P.

But where it is enacted by statute 8 Ann c. 19. "That all candles, and all the materials for making them, should be subject to the debts and duties to the crown, and all penalties, and forfeitures for the same;" it was adjudged, That where a candle-maker was in debt for the single duties, and became a bankrupt, and after the assignment was convicted in the double duties, that this was a lien on the candles, utensils, &c. in the hands of the assignees, and might be taken from them under the statute, notwithstanding the assignment; for the assignees are the representatives of the bankrupt, and they are liable to every equity that would affect him.

Rex v. Mann.  
2 Stra. 729.

Therefore where an extent issues, it shall always be tested of the true day it issues, and shall not be ante-dated so as to over-reach any mesne assignments.

How far the crown is entitled to a preference by extent against a subject, depends upon statute 33 H. 8. c. 39. by it,

it is enacted, "That if any suit be commenced or taken, or process awarded for the king, that the king's suit shall be preferred, and that he shall have the first execution against any person for his debts, *so always the king's suit be taken, and commenced, or process awarded for the said debt at the suit of the king, before judgment given for the said other person.*"

Under this statute it has been held,

"That if execution upon a judgment issues against the goods of the king's debtor, and after that an extent issues, that those goods cannot be taken in."

As in this case, where the plaintiff in *Easter Term*, 17 Uppom v. Sumner. Gen. 3. recovered a judgment in the *King's Bench* against one *Thomas Cann*, and on the 16th of *April* sued out a *fi. fa.* 2 Black. Rep. 1251. a warrant of which was on the 18th delivered to an officer of the sheriff of *Surry*, who on the same day took the goods in execution: on the 24th of *April* an extent issued, and was delivered to the sheriff before sale at the plaintiff's execution, and the sheriff returned *nulla bona* on the plaintiff's writ: on an action being brought for the false return, the court held, That by taking the goods under the plaintiff's execution that they were bound, and the extent could not prevail. Rorke v. Dayrell. 4 Term Rep. 402. S. P.

3. How far in the case of partners the acts of one shall be affected by the bankruptcy of the other in the disposal of the bankrupt effects, *vid. Fox v. Hanbury*, *post. fol. 587.*

## 2. OF TROVER WITH REFERENCE TO THE PERSON.

Under this head I shall consider, 1st, By whom this action may be maintained: 2d, Against whom it lies.

### 1. BY WHOM TROVER MAY BE MAINTAINED.

1. "*Possession* alone gives a sufficient title to maintain this action against all persons, except against the owner."

As where a person *finds any thing*; this gives him such a property as will maintain this action against any person who takes it from him, except the rightful owner. *Armorie v. Delamirie.* 1 Stra. 505.

So where *Sir Thomas Palmer*, seized of a wood, sold 600 cords of the timber of it to one *Cornford* and his assigns, to *Basset v. Maynard.* Cro. Eliz. 800. S. Co. 24 b. S. C.

be taken by the assignment of Sir Thomas Palmer; and Ormsford assigned his right to the plaintiff: Sir Thomas afterward sold 4000 cord of timber of the same wood to the defendant, to be taken at the defendant's election; the 600 cord of wood was marked out by Sir Thomas to the plaintiff, who cut it, and the defendant took it away; on which the plaintiff brought trover and recovered, for though the defendant had a right of 4000 cord of wood to be taken in any part of the wood, yet the plaintiff having cut, and got possession of the wood, had thereby a good and sufficient title.

Rackham v.  
Jeffup & al.  
3 Wils. 332.

So where the plaintiff, claiming a right of common, had cut six load of rushes which grew thereon, and the defendant denying the plaintiff's right, had taken and carried them away, the plaintiff recovered in trover for them; for though the right of common might be doubtful, yet having by possession obtained a special property in them, he could well maintain an action against a stranger.

"But possession is *not necessary* to maintain this action."

Lord Cullen's  
case. Mich.  
14 G. 2.  
Bull. N. P. 33.

For where in ejectment for a mine, it was offered in evidence in proof of possession, that the lessor of the plaintiff had had a verdict in trover for a parcel of lead dug out of the mine, it was held not to be sufficient proof of possession, as trover might be maintained without possession.

"For a *right of possession* is sufficient."

Flewelling v.  
Rave.  
1 Bull. 68.

As where *A.* being indebted to the plaintiff, and the defendant to *A.* and it was agreed between them that the defendant should deliver goods to the plaintiff in satisfaction of *A.*'s debt, the defendant did not do so, but converted them to his own use; it was held, That the plaintiff might maintain trover, *though he never had had possession of the goods.*

2. "But to support this action, *property* in the plaintiff is *essentially necessary.*"

Colston v.  
Woolston,  
Trin. 3 Ann.  
per Holt at  
G. Hall,  
Bull. N. P. 35.

For where the plaintiff had ordered a tradesman to send goods by an hoyman, and the tradesman sent the goods by a porter to the house where the hoyman resided when in town; but he not being there, the porter left the goods with the landlord of the house, and the goods were lost; it was held, That the plaintiff could not have trover for the goods; *for the property never vested in him for want of delivery, but still remained in the tradesman: though it had been otherwise, had the delivery been to the servant of the hoyman, or one employed by him*

him to receive goods; for a delivery to them would have vested the property in the plaintiff. *Ante*, fol. 14.

So where the plaintiff had exchanged an horse with the defendant, and given possession of it, it was held, That though the exchange might have been unfair in the warranty, yet that trover would not lie for it, for *the property was gone out of the plaintiff by the exchange.* Power v. Wells. Cowp. 819. 2 Ref.

So where goods were condemned in the exchequer and proclaimed as forfeited, it was adjudged, That *the property was thereby so altered*, that neither trespass nor trover would lie against the person who had seized them. Ekins v. Smith. Sir Th. Raymond, 336.

"But a parol gift of goods, without some act of delivery, will not transfer a property."

For where the plaintiff's intestate lodged at the defendant's house, and had furniture and plate there, and was proved to have said, that whatever he brought into those lodgings he would never take away, but give to the defendant's wife; and now upon trover for these things, it was ruled at *Nisi Prius* by the Ch. Justice, That a parol gift without some act of delivery, would not alter the property, and that such an act was necessary to establish a *donatio mortis causa*. It then became a question if there had been any delivery; and to prove one, the defendant shewed, that the intestate when he left town, used to leave the key of his rooms with the defendant; and this was ruled to be sufficient, and the defendant had a verdict. Smith v. Smith. 2 Stra. 955.

1. "But an *absolute property* is not necessary, as a person having a *special property* may maintain the action."

As where the goods are seized by the sheriff under a *fi. fa.* the sheriff may maintain this action against any person for taking and converting them to his own use. Wilbraham v. Snow. 1 Lev. 282.

So a carrier may maintain trover for goods entrusted to him to carry, which have been taken out of his possession. 1 Mod. 31.

So if an house let for years be blown down, the lessee may have trover for the timber, though *the property be in the reversioner.* Per Powell. Middl. Cire. Bull. N. P. 32.

So the lord of a manor who seizes an *estrays or wreck*, may have trover for it against a stranger; for he has a possession that may become a property. Sir Wm. Courtney's case. Salk. MSS. Bull. N. P. 32.

*Elizabeth Countess of Rutland v. Isabel Countess of Rutland.*  
Cro. Eliz. 377.

3. It was formerly the opinion, That *executors* could not maintain this action (*Savill*, 133.); but it is now settled that they may have this action *for a conversion of goods in the life-time of their testators*, by the equity of statute 4 Ed. 3. as well as for a conversion in their own times.

Under this head it has been resolved,

*Tremling v. Clutterbook*,  
Style 48.

1. That *if the wife is executrix*, the husband may join in the action; for the possession of the wife as executrix, is the possession of the husband, and the damages recovered may concern them both.

*Lord Hastings v. Sir Archibald Douglas*,  
Cro. Car. 343.  
2 Vern. 246.

2. If the husband devises away jewels, or such things as are *paraphernalia* to the wife, she cannot hold them; but they are recoverable by the husband's executor from her. But if the husband dies *intestate*, or *by will does not dispose of the jewels*, &c. she shall have them.

*Long v. Hebb*.  
Per Rolfe,  
Ch. Just.  
Style 341.

4. *An administrator* may maintain this action for the taking of the goods of the intestate by one *before the letters of administration granted*; for the letters of administration relate to the death of the intestate.

1 Stra. 60.

So he may for a *taking in the life-time of the testator*.

Under this head it has been decided,

1. That an executor *de son tort* is liable to this action at the suit of the administrator.

Anon.  
1 Vent. 349.

And though in such action it appeared that the goods for which the action was brought had been taken in execution, upon a judgment obtained against the defendant as executor *de son tort* by a creditor of the intestate, yet it was held to be no discharge; for men should be discouraged from meddling with intestate estates: though this had been a good discharge *against another creditor* who sued him in the same right.

*Wilson v. Packman*,  
Moor, 3 6.  
Cro. Eliz.  
459. S. C.

2. If an administration has been granted to any person, and the administration is afterwards repealed, and administration granted to another, the first administrator shall not be liable in this action for the goods which he disposed of; but all dispositions by him made shall be valid.

*Whitehall v. Aquire*,  
1 Salk. 295  
3 Mod. 276.  
S. C.

3. It was held by two justices in this case against *Hab*, That where a person, before administration granted to him, permitted a person to take the goods of the intestate, *this assent* should bar him in an action of trover for these goods brought after administration granted.



5. *Baron and feme* may join in this action, for goods which were the property of the wife before marriage, and which goods came to the hands of the defendant before marriage, though they have been converted after; for though the conversion is the ground of the action, and therefore the husband may sue alone, yet the inception of the cause of action was in the wife, by the trover before marriage. Blackborn et ux. v. Graves. 2 Lev. 107. 1 Vent. 260.

## 2. AGAINST WHOM THIS ACTION MAY BE MAINTAINED.

1. "The owner of goods may maintain trover for them against any person into whose hands they may have fallen, though the person in whose possession they are found may have honestly obtained it, provided it was not *by sale in market overt*, or *by other fair transfer*."

As where the plaintiff *left jewels scaled up with his banker for safe custody only*, and the banker broke open the seal and pawned the jewels to the defendant, the plaintiff brought trover for them, when it was adjudged. 1. That the banker being a mere bailee for safe custody, had no authority to open the bag; and by so doing was a trespasser. 2d. That the defendant could obtain no property in the jewels, except by a sale in *market overt*. 3d. That pawning was no sale in *market overt*, and therefore that the property still remained in the owner (the plaintiff) who might therefore well maintain this action to recover them. Hartop v. Hoare. 1 Will. 8. 2 Str. 1187. S. C.

So where the plaintiff gave lottery-tickets to a goldsmith to receive the money for him, and the goldsmith having before given to the defendant a note to deliver to him so many lottery-tickets, delivered to him the tickets he had received from the plaintiff; it was adjudged, That this was not such a transfer as changed the property, but that the plaintiff might maintain trover for them. Ford v. Hopkins. Salk. 283.

So where in trover for a horse, it appeared that he had been stolen from the plaintiff by one *P.* who had sold him to the defendant *under the name of Lyfter*, in *market overt*, and the assumed name of *Lyfter* was entered in the toll-book, it was adjudged by the court, That this *being by a false name*, was not such a sale as should alter the property. Gibbs's case. 1 Leon. 138.

"But where there has been *a fair and regular transfer of the thing in question*, this action will not lie."

Anon.  
1 Salk. 146.

As where a bank-bill, payable to *A.* or bearer, was lost by *A.* and found by a stranger, who transferred it to the defendant; it was held, That though *A.* might have trover against the stranger, yet that it would not lie against the defendant, who by the fair course of trade had obtained a property in it. *Vide Miller v. Race, ante, fol. 39.*

2. "When the taking of the goods has been tortious, an actual conversion to the party's own use is not necessary to maintain this action."

Tinkler v.  
Poole.  
3 Will. 146.  
3 Burr. 2657.  
8 C.  
Chapman v.  
Lamb.  
2 Stra. 943.

As in the case of goods seized by customhouse-officers which are not liable to duties, as the wearing apparel and necessaries of passengers on board ships; for there trover will lie against the customhouse-officers who may have seized them, though the goods are lodged in his majesty's stores, and so are not converted to the use of the defendant, the officer.

"So trover will lie against a servant for goods which he has wrongfully obtained, though they have been converted to the use of the master."

Perkins Aff. of  
Hughes v.  
Smith.  
1 Will. 328.

For where *Hughes* the bankrupt, was possessed of the goods for which the action was brought on the 22d of September, on which day he became a bankrupt: on the 23d of September the defendant *Smith*, who was servant and rider to Mr. *Gerraway*, to whom the bankrupt was considerably indebted, went to his shop to get the money, which was shut up; but the bankrupt delivered to him the goods in question, and he gave a receipt for them in his master's name, and sold them for his use: it was objected, That the action would not lie, the conversion being to the master's use; but *per Cur.* The point is, Whether the defendant is not a wrong-doer, if he is, no authority he could derive from his master could excuse him? The bankrupt had no right to deliver the goods to *Smith*, nor *Smith* to dispose of them; and the gift of the action of trover is the disposal and conversion of the goods of another wrongfully.

"But where the taking has not been tortious, there must be some evidence of a conversion."

Rofs v. Johnson  
and Dawson.  
5 Burr. 2825.

As where trover was brought against the defendants as wharfingers, to whom certain goods of the plaintiff had been delivered, and which they had not delivered to the owner. The goods were lost or stolen out of the defendants possession. The plaintiff, before the commencement of the action, demanded the goods and tendered the wharfage; the goods not being delivered, he brought this action for

for them, when it was held, That for goods stolen or lost out of the wharfinger's possession, this action would not lie; for to maintain trover an injurious conversion ought to be proved, and that a bare non-delivery was not sufficient, as this might have been a mere omission, for which the remedy should be an action on the case, not trover, which supposes an actual wrong.

"But if one man is intrusted with the goods of another, and puts them into the possession of a third person, contrary to orders, it is a conversion; and trover may be maintained for them."

As where the plaintiff was owner of goods on board the defendant's vessel, then lying in the Thames, and he directed the defendant not to land the goods at the wharf at which the vessel lay: the defendant promised not to do so, but afterward apprehending that the wharfinger had a lien for his fees on the goods, because the vessel was unloaded at the wharf, he delivered the goods to the wharfinger, who was ready to deliver them on payment of the fees. It was objected that the action should be *case* for misdelivery, and that trover would not lie, as the plaintiff's right to the goods was not denied; but it was adjudged, That though the right was so admitted, that a charge was brought on the plaintiff for the fees; and that the goods being delivered against the owner's orders, and no right being shewn to the wharfage as set up, that it was a conversion, and the action maintainable. *Syeds v. Hay.* 4 Term Rep. 260.

"It is not necessary to support this action that the owner should be absolutely deprived of his goods by the conversion of him who has had possession of them; for damages are recoverable in this action for any partial conversion or user of the goods of another by the owner, after he has recovered possession of them."

As where a carrier took part of the liquor out of a vessel which he was employed to carry, and filled it up with water; it was adjudged to be a conversion of the whole, and the plaintiff recovered accordingly. *Richardson v. Atkinson.* 1 Stra. 576.

So if a man takes my horse and rides him, and afterwards delivers him to me, yet I may maintain trover against him; for the riding is a conversion, and the redelivery will only go in mitigation of damages. *Per Popham.* Goldb. 155. 1 Danv. 21.

4. "Wherever the law has given a lien upon any goods or other things of value, there the retaining of them shall not subject the person to an action of trover."

1. This

Per Lord  
Mansfield.  
4 Burr. 2221.

1. This doctrine in favour of liens, the courts of late years have much leaned to, for the convenience of trade; allowing it, first, Where there is an *express contract to that effect*; and, secondly, Where it is *implied*, either from the *usage of the trade or the manner of dealing between the parties*.

Krutzer v.  
Wilcox.  
2 Burr. 936.  
Drinkwater v.  
Goodwin.  
Cowp. 251.

As, 1. A *factor* has a lien upon goods consigned to him, not merely for what is due for those goods, but for the *balance of a general account*, and for which he may retain them. So he has a lien on the money in the hands of the buyer.

Foxcraft v.  
Devonshire.  
2 Burr. 932.  
1 Black. Rep.  
193.

And though in this case, goods had been consigned to a factor by a trader, and *the factor knew the trader was in insolvent circumstances*, but he, nevertheless, advanced him money on the credit of the goods, it was adjudged, That he was entitled to a lien against them for the money he had advanced, and should hold them against the assignees of the consignor.

2. "In the case of *manufacturers*, the lien which they have against the goods entrusted to them to manufacture, is not a general one, but confined to the *work done to the goods themselves*, unless express usage of the trade is proved to the contrary."

Ex parte  
Ockenden.  
1 Atk. 235.

As where the bankrupt was a flour-factor, and had employed the petitioner, who was a miller; and he having always a large quantity of corn in his hands, and a great number of sacks, had, relying on these as a security, trusted the bankrupt very largely; and when he became bankrupt, he owed to the petitioner 286*l.* for grinding done before, and 16*l.* for grinding corn then in hands, which corn and the sacks the petitioner insisted upon holding for his debt. But Lord *Hardwicke* held, That as the petitioner had shewn no general custom for a lien, that it only depended on the bailment proceeding from a delivery of goods for a particular purpose, *which could not be extended beyond the work done to the goods themselves*.

Green v.  
Farmer.  
4 Burr. 2214.

So that a manufacturer who takes in goods for a particular purpose (as to dye them) has a lien on them, *for the work done to the goods themselves*; but cannot retain them *for any other demand against the owner of the goods*, was held by the court of King's Bench in this case.

"But the *usage of trade* will create a *general lien*."

Ex parte, Decze.  
1 Atk. 237,  
& 228.  
Downman v.  
Ahews.  
Chanc.  
S. P.

As where it was proved to be the usage for *packers* to lend money to clothiers, and the clothes left to be packed were considered as a *pledge*, not only for the packing, but for

for the loan of the money likewise; and here the bankrupt, who was a clothier, having borrowed money on a note of hand from the petitioner, who was a packer, but *at a time when he had no dealings with him*, and the bankrupt having afterwards sent him cloth to pack, it was held, That he might retain the cloth for the debt, as well as for the price of packing.

3. "In the case of *pawns*. The pawning, from the nature of the transaction, creates of itself a lien."

And where a testator had borrowed a sum of money upon jewels, and afterwards borrowed three other several sums, for each of which he gave his note, without taking any notice of the jewels, it was determined, That the borrower's executors should not redeem the jewels without paying the money due on the notes; for it must be presumed, that the pawnnee trusted to the pledge he had in his hands, by the money being lent subsequent to the pawning, which excluded the presumption of any trust to the person: but if the loan had been prior to the pawning, there had been no lien.

"But though the act of pawning creates a lien in favour of the pawnnee, yet it cannot give him a greater interest in the thing pawned than the pawner himself had."

Therefore where a tenant for life of plate, pawned it to a pawnbroker, and died, it was adjudged, That though the pawnbroker had no notice of the property the person pawning had in the thing, that he could have no lien on the plate as against him in remainder.

4. If a person in England repairs a ship, he has no lien against the body of the ship for the repairs done to her: though for repairs done beyond sea, the master may hypothecate the ship herself.

So neither has the master any lien on the ship for any money expended by him in repairs on her in England, or for money due for his own wages; for such contracts are entirely personal.

"But where a person saves goods out of a ship which is in danger, he shall have a lien on the goods for salvage."

As where the ship took fire, and the defendants, at the hazard of their lives, saved the goods, it was held by justice Holt, That in trover for the goods, the defendants might

*Demainbray v. Metcalf.*

*Proc. Chanc.*

*419.*

*2 Vern. 691.*

*S. C.*

*1 Atk. 236.*

*Ex parte Shank.*

*1 Atk. 234.*

*376.*

*Wilkins v.*

*Carmichael.*

*Dougl. 97.*

*1 Ld. Raym.*

*398.*

might give in evidence that they detained them till paid for the salvage.

Robinson v.  
Walter.  
3 Bullst. 268.  
1 Rolle's Rep.  
449.

5. *An innkeeper hath by law a right to detain an horse left with him till he is paid for his keeping; for as he is by law compellable to receive a guest and his horse, so he shall have this remedy. And though in this case the horse had been brought to the inn by a stranger, without the owner's knowledge, and was afterwards claimed by the owner, yet it was held, That the innkeeper might notwithstanding keep the horse till paid; for so by pretended ignorance that his horse was sent to an inn, might the owner defraud the innkeeper, by getting his keeping for nothing.*

York v.  
Grindstone.  
Salk. 388.

So that to give this right of retainer, it is not therefore necessary that the *owner should be a guest*; for merely leaving his horse at an inn gives this right of retainer till paid for his keeping to the innkeeper.

Jones v. Pearle.  
1 Stra. 557.  
Warbrook v.  
Griffin.  
2 Brownl. 254.

But this power of retaining is only *while the horse remains in the innkeeper's possession*; for if he suffers the horse to be taken away, and the horse is brought again to his inn, he cannot retain him for the former demand.

Per Ld. Kenyon.  
Hunter v.  
Barkley.  
Sitt. Mich. 32  
G. 3. MSS.

And this privilege of retainer is confined to innkeepers; for a *livery stable-keeper* has no such privilege to detain an horse for his keeping; for it is allowed to innkeepers, on the ground of their being obliged to receive guests and their horses; but that is not the case of livery stable-keepers, who rely on the contract.

Jones v. Pearle.  
1 Stra. 557.

So the innkeeper cannot *sell* the horse except in *London*, where, by the custom, he may sell the horse for his keeping; and therefore, in this case where a carrier had been in debt to an innkeeper at *Glastenbury* for the keeping of his horses, and he seized and sold three of the carrier's horses, the carrier recovered in this action.

Moss v.  
Townsend.  
quot. 3  
Bullst. 271.

So by the customs of *London* and *Exeter*, if an horse at an inn eats out the price of his head, the innkeeper may have a reasonable appraisement of his value made by four of his neighbours, and *take him as his own*, according to that valuation, for his debt.

Skinner v.  
Upshaw.  
2 Ld. Raym.  
752.

6. So a *carrier* may detain goods entrusted to him to carry, till he is paid for their carriage.

Per Ld. Mansfield.  
Douglass. 226.

7. "*An attorney* has a lien against the papers, &c. of his client, and may retain them till paid his bill of costs."

But where a clerk in court advanced money to a solicitor to carry on a cause, it was adjudged, That he could not detain the client's papers as a pledge for the money advanced by him to the solicitor, but should have recourse to the solicitor himself.

Grey v. Cockerell.  
2 Atk. 114.

8. "But this right of lien being admitted for the benefit of trade, it shall be confined in its operation to that only."

Therefore where the owner of five cows put them to pasture with the defendant, and agreed to pay him 12d. per week for each cow, and afterwards the owner sold them to the plaintiff, it was adjudged, That the defendant could not justify the detaining them for their keeping, but was put to his action against the first owner.

Chapman v. Allen.  
Cro. Car. 271.

So if an horse be distrained to compel an appearance in the hundred court; after an appearance, the person who took the horse cannot justify detaining him till paid for his keeping.

Linton v. Cook.  
H. 9 Geo. 2.  
Bull. N. P. 45.

So where A. purchased an interest in a lease, and the writings were left in the hands of an attorney to draw an assignment, which he did, and it was executed; it was held, That he could not refuse to deliver it up to A. till paid for it.

Anon.  
1 Lord Raym.  
738.

So where the defendant paid the duty at the custom-house for a parcel of goods, the property of the plaintiff, which had come home in the same ship with other goods of the defendant's, it was held, That he should not retain the goods till paid what he had advanced for the duty, for he might have his action for the money.

Stone v. Lingwood.  
1 Str. 652.

So where in trover for a dog, the defendant justified the detaining him, on the ground that the dog had strayed casually to his house, where he had kept him twenty weeks, and demanded the expence of his keeping: on a case made, Whether the refusal amounted to a conversion? the defendant's counsel declined to argue it; so the *posse* was ordered to the plaintiff.

Binstead v. Buck.  
2 Blackst. Rep.  
1117.

"And in general, no person can in any case retain where there is a special agreement to pay, for then the other party is personally liable."

For where the defendant, who was a farrier, undertook to cure the plaintiff's mare for a certain sum, he performed the cure, and then refused to deliver her up till paid for her keeping and cure; the plaintiff brought trover for the mare; when

Brenan v. Currant.  
Sayer Rep. 224.

when it was adjudged, That having *made an agreement* for a certain sum, that he must sue on the agreement; and had no right to retain the mare till he was paid.

Mead v.  
Hammond.  
1 Stra. 505.

5. Trover will lie against the master for *goods which were delivered to the servant.*

Jones v. Hart.  
Salk. 441.  
1 Lord Raym.  
728. S. C.

But in such case it is not sufficient that the goods were delivered to the servant, unless it appears that the goods *came to the hands of the master*, or unless *the servant was usually employed by the master to receive the goods in the way of the master's trade*: As in this case, which was of a pawn delivered to a pawnbroker's servant, and which being lost, the pawner recovered in trover against the master.

Perkins v.  
Smith.  
1 Willf. 328.  
ante 580.

So trover will lie against the *servant himself* for disposing of the goods of another person, though to his master's use, and that whether he had authority from his master to do so or not.

Brown v.  
Hedges  
Salk. 290.  
2 Ref.

6. One *tenant in common, joint-tenant, or partner*, cannot have trover against his companion; for the possession of one is the possession of all.

Holliday v.  
Camsell.  
East. 27 Geo. 3.  
1 Term Rep.  
658.

Therefore where the plaintiff was a member of an amicable society, and kept the box containing the subscription, which defendant who was also a member took away, it was held, That they were tenants in common of the box, and so that one could not maintain trover against the other.

“ But this is only in cases where the property is equal; so  
“ that the possession of the one is the possession of the other.”

West v. Pas-  
more,  
at Exon, per  
Turton, Just  
Bull. N. P. 35.

For where there were two tenants in common of lands, the *one in fee*, the *other for years*, and the tenant in fee cut trees, which the tenant for years converted to his own use; it was held, That the other might have trover for them, for they belonged *entirely to the inheritance.*

Co. Littl.  
200. a.

“ So if one tenant in common *destroys* the thing held in  
“ common, the other may have trover against him for it, for  
“ that is a *total* conversion to his own use of what he had  
“ only a part.”

Barnardiston v.  
Chapman &  
Smith.  
Hill. 1 Geo. 1.  
Bull. N. P. 34.

As where one part-owner of a ship took her and sent her on a voyage to the *West Indies*, where she was lost, and the other owners having brought an action for it, Lord King left it to the jury, Whether, they being tenants in common of  
the



the ship, this was not a *destruction* by the defendant? and the jury found accordingly, and the plaintiff recovered.

But otherwise in the case of *partners in trade*, each has a power singly to dispose of the whole partnership-effects, and even if one of the partners becomes a bankrupt, yet every act of the solvent partner without knowledge of the act of bankruptcy, as in making consignments or sales of goods, &c. if done *bona fide* and without fraud, is good, so that the assignees of the bankrupt partner cannot recover by this action the goods so disposed of by the other; neither, if the solvent partner afterwards becomes himself a bankrupt, can the assignees under the joint commission against both, maintain trover against the *bona fide* vendee or consignee of the partnership-effects.

Fox v. Hanbury.  
Cowp. 445.

7. Trover will not lie against *executors or administrators* for a trover and conversion of goods by their testators or intestates; for it is founded on a tort; and actions founded on torts committed by the testator or intestate, cannot lie against executors or administrators.

Hambly v. Trott  
Cowp. 375.

8. Trover will lie against *baron and feme* whenever the conversion has been by the wife before coverture, or by herself after coverture; for it being a tort by her, she shall be joined with her husband in the action.

Marsh's case.  
1 Leon. 312.  
Owen 48.  
Drape v. Fulkes.  
Yelv. 165.  
Sir W. Jones,  
143.

### 3. OF THE PLEADINGS AND EVIDENCE IN THIS ACTION.

#### I. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. In trover *the conversion is the gist of the action*, and the manner in which the goods came to the defendant's hands is but inducement; the plaintiff may therefore declare upon a *devenerunt ad manus* generally, or specially *per inventionem* (even though in fact the defendant came to them by delivery) or that the defendant fraudulently obtained them (as by winning them at cards from the plaintiff's wife); and this being inducement, need not be proved: but it is sufficient to prove property in the plaintiff, the possession of and conversion by the defendant.

1 Danv. Abr. 23.  
Bull. N. P. 33.

2. It was formerly usual to tie up the plaintiff to great strictness, in specifying in the declaration the nature, quality, and quantity of the goods for which the action was brought; and numberless cases in the old books, of arrests of judgment in trover, turn upon that objection. But greater latitude is now

Bottomley v. Harrison.  
2 Stra. 809.

now allowed: as a declaration for one parcel of packcloths, without setting out the exact quantity, has been held to be good: so for fifty pieces of square timber.

Per Holt at  
G. Hall, 1707.  
Bull. N. P. 37.

Wilson v.  
Chambers.  
Cro. Car. 262.

Therefore in trover for a *debeture* against the defendant, in whose possession it was, it was ruled, That the plaintiff need not set out *the number* of it, nor in trover for a *band* need he set out the *date*; for being out of possession, he might not know the exact number or date: but if he does in his declaration set out the number or date, he *must prove it exactly as laid, and the sum to a farthing, or he shall be nonsuited.*

1 Brownl. 8.  
1 Vent. 135.

3. "The declaration in trover should state *the time* of the conversion; and for want of alladging it, judgment was in "this case arrested."

Telfmond v.  
Johnfon  
Cro. Jac. 428.

But where the plaintiff in his declaration under a *scil.* laid the conversion on a *day before the trover*, and this was alledged in arrest of judgment, the court held, nevertheless, that the *posita convertit* was sufficient, and the *scil.* being inconsistent, to be void.

Hubbard's case.  
Cro. Elis. 78.

4. So the declaration should state *a place* where the conversion was made, or the declaration will be ill in substance for want of a venue.

Anon.  
Clayt. 131.

But the want of a place is aided if the defendant pleads a special plea, as a sale in market overt, *viz.* at *S. in Cam. Nat.*; for then a *venue is laid in the plea*: but where the plea is so, the proof of a sale in another place in market overt will not support the declaration.

Brown v.  
Hedges.  
Salk. 290.  
1 Ref.

But though a time and place of conversion must be alledged in the declaration, yet the action being transitory, the conversion may be laid here, and proved in *Ireland*.

Godwin v.  
Harwood.  
2 Roll. Rep.

5. The declaration in trover need not alledge *the value of the goods*, aliter in detinue, where the goods themselves are to be recovered, or the value of them.

Neithorp & ux.  
v. Anderfon.  
Salk. 114.

6. In trover by *baron and feme*, it is bad to declare that the defendant converted the goods *ad damnum ipsorum*, for the possession of the wife is the possession of the husband, and so is the property; the conversion therefore cannot be to the damage of the wife, but of the husband only.

Berry v. Nevis.  
Cro. Jas. 661.

So for the same reasons, in trover against baron and feme the conversion must be laid *to the use of the husband*, and not

to her, or their life; for she can have no property in things personal during coverture.

7. In declaring in this action by an executor, it seems not to be material that the declaration should state the time of the conversion, whether in his own time or in that of his testator, as the executor may in either case well support the action. Eliz. Countess of Rutland v. Mab. Countess of Rutland. Cro. Eliz. 377. 2 Ref.

So as an executor is possessed of his testator's goods, *ut de bonis propriis*, he may declare in that manner, and yet that the conversion of them was *in regardationem executionis testamenti*. Rivers v. Godskirt. Cro. Eliz. 568.

8. In trover by an administrator, he may declare generally that administration was granted to him by A. B. official of the bishop of ———, without saying that he was ordinary of the place, or had the right of granting administrations. Lacy v. Smith. Cro. Eliz. 102.

So an administrator may declare that he was possessed of divers goods and chattels as of his own proper goods; and though they were the testator's in fact, yet the declaration is good. Hudson v. Hudson. Latch. 214.

In trover by an administrator for rum taken and converted in the life-time of the intestate: upon evidence it appeared, that the rum had been taken in the testator's life-time, but converted after his death; and this evidence was held to maintain the declaration; for the time of using the rum lay in the breast of the defendant, who ought to have disclosed it by his plea; and the taking in the intestate's life-time and keeping it till his death, was sufficient to maintain the declaration. Crozier v. Ogleby. 1 Stra. 60.

## 2. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "As this action equally lies where the taking has been tortious, or where the defendant has lawfully obtained possession of the plaintiff's goods and afterwards converted them; what shall be evidence of a conversion, seems in these two cases to be different."

For where an actual taking of the goods in question is given in evidence, that is sufficient without shewing a demand and refusal, for it is an actual conversion; but when defendant comes to the goods by finding, delivery, or bailment, for example, there an actual demand and refusal must be shewn in order to establish a conversion, unless an actual conversion can

Bruen v. Roe. Sid. 264. Beckwith v. Elvey. Clayt. 112.

can be proved; in which case it is not necessary to prove a demand, proof of the conversion being sufficient.

*Eaton v. Newell*, 10 Cr. Eliz. 495. But in general, a demand and refusal is sufficient evidence of a conversion.

*5 Burr. 1423.* Though it is not of itself a conversion; for if the jury find only a special verdict, viz. that there was a demand and refusal, the court cannot adjudge it a conversion.

“For a refusal on demand may be justifiable and lawful under particular circumstances.”

*Per Coke, Ch. Just.*  
*2 Bulst. 312.* As if a person finds my goods, and I demand them; and he answers, that he knows not whether I am the true owner or not, and therefore refuses to deliver them, this is not to be deemed a conversion to his own use, as *he keeps them for the owner.*

“So where the person has a lien in the cases before mentioned, he may lawfully refuse to deliver the things when demanded, till satisfied to the amount of his lien.”

*2 Show. 161.* As an innkeeper may refuse to deliver an horse standing at his inn till paid for his keeping.

*2 Lord Raym. 752.* Or a carrier to deliver goods, till paid for the carriage; these refusals being lawful, cannot amount to a conversion.

“But a demand and refusal is only presumptive evidence of a refusal; for if it appears that there has been no conversion in fact, this action will not lie.”

*Anon. Salk. 655.*  
*Lord Raym. 752.*  
*5 Burr. 2827.* As in trover against a carrier for goods; which appears to have been either lost or stolen, in such case denial is no evidence to support the conversion necessary in this action, since the contrary is proved, though the carrier would be liable under the custom of the realm; but if this did not appear, or if the carrier had the goods in his custody when demanded, it had been good evidence of a conversion. *Vide Regs v. Johnson and Dawson, ante 580. S. P.*

*2 Mod. 245.* So if the defendant had cut down the plaintiff's trees, and left them on the ground, this could not support a conversion, since it is plain that they were left in the plaintiff's possession.

*Rookeby's case. Clait. 122.* 2. A demand of satisfaction for goods taken, and a refusal, was in this case adjudged to be sufficient evidence of a conversion, though there was no demand of the goods themselves.

3. If the plaintiff proves the goods to have been in his possession, it is *prima facie* evidence of property; but the defendant may prove them to be the goods of J. S. who died intestate, and that letters of administration have been granted to him: but such evidence will not be conclusive against the plaintiff; for he may shew that he was married to J. S. and so entitled. Blackham's case. Salk. 290.

4. In trover by a stranger for goods taken at sea, he must shew, in order to support this action, besides a property in himself, first, That his sovereign was in amity with the king of England: secondly, That his sovereign was in amity with the sovereign of the defendant; for if there was a war between them, then the capture would be legal. 4 Inst. 154.

5. As to the evidence in actions under commissions of bankruptcy, it has been decided,

1. That a man cannot be a witness to prove an act of bankruptcy committed by himself; but his confession to a third person, that he went out of the way to prevent being arrested, or to such like facts as are acts of bankruptcy, is admissible evidence. Ewens v. Gould, per Hardwicke, Ch. Just. Hill. 8 Geo. 1. Bull. N. P. 4b.

So a verdict upon an issue directed out of chancery to which only one of the defendants was party, may be read against all to prove the time of the act of bankruptcy. Field v. Curtis. 2 Str. 829.

So no release can make the bankrupt's wife a witness to prove an act of bankruptcy committed by the husband. Field v. Curtis. 2 Str. 829.

By statute 5 Geo. 2. 30, 41. "The depositions of the witnesses taken before the commissioners, as to the act of bankruptcy, &c. are upon petition to the chancellor directed to be recorded, which record shall be evidence of the several matters contained therein, after the death of the witnesses."

Under this statute it was decided, on a question respecting the time when the bankrupt became so, that the depositions so taken before the commissioners, and recorded pursuant to the statute, were good evidence to prove the precise time when the act of bankruptcy was committed; it being proved, that the witness who had proved the act of bankruptcy before the commissioners, was dead. Janson Ass. of Burton v. Wilson. Doug. 244.

2. "In proving the debt of the petitioning creditor, it must be done by the same evidence which would be required in an action against the bankrupt." Per Buller Just. Doug. 206.

Therefore where the petitioning creditor's debt was money due on a bond, and the evidence to prove it was, that the bankrupt Abbot & alt. Ass. of Farr v. Plumb. Doug. 205.

*bankrupt had acknowledged to the witness that he was indebted to the petitioning creditor the amount of the bond, but the subscribing witness was not produced, it was adjudged to be insufficient, and the plaintiffs were nonsuited: for proof by the subscribing witness is the only legal evidence in an action on the bond.*

3. "In actions to recover any part of the bankrupt's property, a creditor is clearly from interest an incompetent witness."

Granger v.  
Furlong.  
4 Black  
Rep. 1273.

But where, on a motion for a new trial, on the ground that a creditor who had proved a debt under the commission had been admitted to prove the debt of the petitioning creditor at the trial, it appeared that he had *sold his chance of recovering his debt* to another person for less than five shillings in the pound, and had released the assignees, and so in fact had no interest, he was held to be a competent witness to support the commission.

Ewens v. Gold.  
Ld. Hardwicke.  
8 G. 4.  
Bull. N. P. 43.

So the bankrupt cannot be a witness to swear property in himself, or a debt due to himself, without a release of his share of the surplus and the dividends: but he may prove property in or a debt due to another.

Butler v. Cooke.  
Cowp. 70

For the rule is, That an uncertificated bankrupt may be a witness to diminish the fund which is to pay his creditors, by proving the property out of himself, for so he swears against his own interest; but he cannot be a witness to prove property in himself without a release, for that is to increase the fund, and so he is interested.

Per Ld. Kenyon.  
Kennet v.  
Greenwollers.  
Westm. Sitt.  
Hill. 30 Geo. 3.

Therefore where a trader has been *twice a bankrupt*, in an action by the assignees under his second commission he is an incompetent witness, even with a release, *unless he has paid fifteen shillings in the pound*; for he is not merely interested in the surplus and dividends on that commission, but has a further interest, *viz.* to discharge his future effects, which he does by increasing the fund of his second commission, as his future effects are liable in case he does not pay fifteen shillings in the pound. This objection was taken by the Chief Justice himself at *Nisi Prius*.

### 3. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Devoe v. Dr.  
Coridon.  
1 Keb. 305.

1. It is said by Justice *Twisden* in this case, that there is no plea in trover but the *general issue*, and the *special one of a release*; for every plea in justification is tantamount.

But,

But however, numberless special pleas allowed appear in the books; and Lord Ch. Just. *Halt*, in *Salk.* 654, allows this one following to be of that description, though he says, That it is the only good special plea in the books, viz.

To trover for two pipes of wine, the defendant pleaded, Kenicot v. that so much is due to the king out of every twenty pipes of Bogan. wine imported for *prifage*, and for which he took the wine in Yelv. 198. question; this plea was held to be good.

But other special pleas have been allowed.

As where the defendant pleaded, that the plaintiff had had Lechmere v. a judgment in trespass against him for taking the same goods; it Toplady. was ruled to be a good plea. Show. 146.

So a recovery in trover for the same goods against J. S Brown v. was held to be a good plea. So if the trover had been against Wooton. the defendant, and the plaintiff had recovered. Cro. Jac. 73.

For where there is a recovery in trover, as the plaintiff is Adams v. supposed to get damages to the value of the goods, they then Broughton. become the property of the defendant, so that the plaintiff in 2 Stra. 1078. neither case has a property in the goods.

“So that it seems that all these cases of justification may be given in evidence under the general issue.”

As where in trover for taking a gun, the defendant plead- Dane v. Walter, ed the general issue, and gave in evidence, that he was game- in Kent, 1682. keeper of the manor of B. and took the gun under stat. 22 Bull. N. P. 48. & 23 Car. 2. it was held to be well; though as the act does not authorize the pleading the general issue, it would be otherwise in trespass.

It will however be proper to mention some cases of good justifications in this action, so as to enable defendants to avail themselves of them for their defence, whether in the form of a plea, or as evidence under the general issue.

1. As where the defendant to an action of trover for ten Culling v. loads of timber, pleaded, “That he was tenant to the plain- Tuffnall. tiff, and had erected a barn on the premises, and put it upon par Treby, blocks and timbers lying upon the ground, but not fixed in J. at Here- it, and which it was the custom of the country so to fix, and Bull. N. P. 24. carry away at the end of the lessee’s term,” it was held to be a good justification; and the defendant had a ver- dict.

Hoole's case.  
Salk. 368.

So things fixed to the freehold, and set up by the lessee for the convenience of trade (as vats, coppers, tables, &c.) may during the term be removed by the lessee, and are liable to be seized and sold by the sheriff under a *fiat facias*, issued against the lessee who erected them.

Bull. N. P. 34.

For though the general rule of law is, That things fixed to the freehold cannot be removed, yet this has of late years admitted many exceptions, and many things are now allowed to be carried away, which could not formerly; as marble chimney-pieces, &c. and still more, fixtures for the benefit of trade; as brewing vessels, cyder mills, and such like: this is as between landlord and tenant, and tenant for life or in tail, and the reversioner; but the rule still holds as between heir and executor.

Harvey v.  
Harvey.  
1 Str. 1142.

But in this case, which was trover by the coparcener against the heir, the Chief Justice held, That *hangings, tapestry, and iron backs to chimneys*, belonged to the executor, who recovered accordingly.

Hamilton v.  
Davis.  
3 Burr. 2732.

2. In this case the defendants justified the detention of goods as *wreck*, the goods having been cast on shore, and no animal having escaped alive from the wreck, so that they belonged to the grantee of the crown: but it was resolved, That if by any marks, as the initials of the owner's name on casks, or by any means the property can be traced and clearly made out, that such goods shall not be deemed wreck, but belong to the owner, though nothing living has escaped from the ship.

Palmer v.  
Woolley.  
Cro. Eliz. 454.  
3 Co. 83.  
S. C.

3. In trover for goods, the defendants justified, "That by prescription, every shop in London, should be a market open for all wares sold there, and that the goods were so bought there;" it was adjudged, That the custom was too general and unreasonable; for a sale is only good as in market, where a thing is bought which appertains to the trade of that shop, as plate at a silversmith's, &c. but not if bought in a back-shop, or place not open, or in a shop whose trade is in goods or wares of a different nature from those sold.

Thompson v.  
Clark.  
Cro. Eliz. 504.

4. In trover for goods, and conversion of them, at *D. in Com. Nottingham*, the defendant justified, "That he recovered against the plaintiff a debt of 20*l.* by bill in *K. B.* and had thereupon a *fi. fa.* directed to the sheriff of the county of York, who at *Wakefield*, in that county, seized and delivered to him the goods in question," and so justified the conversion; on demurrer, the plea was held to be ill, because the



the sheriff cannot deliver the defendant's goods taken in execution, to the plaintiff in satisfaction of his debt.

5. The defendant in this case justified the taking of the goods as bailiff of the king for a distress upon a plaint in *curia regis*, and selling them; this on demurrer was held to be bad; for the goods taken upon a distress should not be sold, especially in a court-baron, though it were the king's. *Gomerai v. Wyatt*. Cro. Jac. 225.

6. "Therefore a plea in justification should always shew a complete title."

As where the plea was a justification of the taking, as *Davies's case*. *Waif*; it was held that the plea should state that a felony was committed, and that the goods were waived by the thief, or it is bad. *Brownlow v. Lambert*, *Err. Eliz.* 716. *S. P.* Cro. Eliz. 611. Foxley's case. 4 Co. 109.

So the plea in justification should either traverse the conversion, or confess and avoid it; for the conversion is the gist of the action, and it is not therefore sufficient to justify the taking only. *Agars v. Little*. *Hutt. 10.*

2. Another plea in this action is the statute of limitations: as to which it is enacted, "That actions of trover must be commenced within six years after the cause of action accrued, by stat. 21 Jac. I. c. 16."

1. "This statute begins to run from the time of the conversion, for then the cause of action accrues."

For where an executor left furniture of the testator's in the house by consent of the heir, who used it, and afterwards refused to deliver it to the executor when demanded, the executor brought trover for it, and the heir pleaded the statute of limitations; but *per cur.* the user by consent and before demanded was no conversion, and the refusal, which is the only evidence of it, being within six years, the action is not barred. *Wortley Montague v. Lord Sandwich*. Farreley 99.

2. Where to a plea of the statute of limitations, the plaintiff replies that the action was commenced before the six years expired, he ought to set out the day when the writ was sued out; it is not sufficient to say that he sued it out generally in *last term*, or so. *Coles v. Sibbye*. *Style 178.*

And by no fiction of law of reference to the first day of term shall the plaintiff be barred of his action; but he shall always be at liberty to aver the true time of suing out the writ. *Morris v. Harwood & Pugh*. 3 Burr. 1243.

3. If one joint-tenant brings trover against a stranger without joining his companion, the defendant should plead it in abatement; 3 Ref. *Brown v. Hedges*. Salk. 290.

abatement; and cannot take advantage of it on the general issue. 2 Lev. 113. Cro. Eliz. 544.

Cheffield v.  
Messenger, per  
Parker, Ch. Bar.  
at Gloucester,  
1747.  
Bull. N. P. 48.

4. In trover by a rightful administrator against an executor *de son tort*, the defendant cannot give in evidence payment of debts to the value of goods which are still in his hands, but only for such as he had sold. *Ante, Anon. 1 Vent. 349.*

Blainfield v.  
March  
Balk. 285.

If an administrator brings trover on his own possession, the defendant may give in evidence on the general issue *a will and an executor*; but if the action be brought on the possession of the intestate, the defendant must plead it in abatement, and cannot give it in evidence on the general issue.

5. In some cases the defendant is allowed to *bring the things for which the action is brought into court.*

Anon.  
1 Stra. 143.

As in the case of *trover for money*, the court gave leave to bring the money declared for into court; but the court said they would do it in this case only, and *not in trover for goods.*

Cook v.  
Holgate.  
2 Barnes 284.

And so it was in this case denied, which was *trover for goods* which are cumbrous, and require room; but the court granted a rule to shew cause why on delivery of the goods to the plaintiff and paying of costs, the proceedings should not be stayed.

Fisher v. Prince.  
3 Burr 1364.  
Whitten v.  
Fuller  
2 Black. Rep.  
962.  
Catlin v. Catlin.  
1 Will. 23.

And where the *goods* are of an ascertained value, and there is no tort to encrease the damages, they may be brought into court.

And *Note*, That the defendant in this action may be held to special bail, on an affidavit that the goods converted amount to above 10l.

## 4 OF THE DAMAGES AND COSTS.

### I. OF THE DAMAGES.

Olivant v.  
Berino.  
1 Will. 23.

“ The judgment in trover can only be for *damages*; for the court will not make an order that the plaintiff shall *take back his goods again, for which the action is brought and costs*, and discontinue his action, for the action is not for the goods, but for damages for the taking and conversion.”

Knight v.  
Bourne.  
Cro. Eliz. 116.

So where in trover for an horse the judgment was, That the plaintiff should recover either the horse or damages, judgment was reversed.

But however, where the things for which this action is brought can be restored *in specie*, and undiminished in value, it is usual in practice to restore the goods to the plaintiff the owner, and for the jury then to find nominal damages.

And the jury cannot assess damages and costs *together* to more than the damages laid in the declaration; but they may assess the damages to that amount, and the costs beyond it to any amount. Rivers v. God-  
skirt.  
Cro. Eliz. 568.  
3 Ref.

## 2. OF THE COSTS.

1. The statutes which take away costs from the plaintiff do not extend to actions of trover; therefore in it the plaintiff is always entitled to full costs when he recovers.

2. The stat. 8 & 9 W. 3. c. 11. which gives costs to one defendant who has been acquitted, where there are several Marriner v.  
Barret.  
Pasch. 1 G. 2.  
quot.  
3 Burr. 1284.  
*vid. ante, chap. of Trespass*) does not extend to trover.

## CHAPTER

## CHAPTER XIII.

## The Action of Trespass on the Case.

**T**RESPASS on the Case, is an action brought for the recovery of damages, for acts *unaccompanied with force*, and which in their consequences only are injurious: for though an act may be in itself lawful, yet if in its effects or consequences it is productive of any injury to another, it subjects the party to this action.

Reynolds v.  
Clarke.  
3 Stra. 334.

As where the defendant put up a spout on his own premises, this was an act lawful in itself; but when it produced an injury to the plaintiff, by conveying the water into his yard, trespass on the case was adjudged to lie for such consequential injury.

Hickeringall's  
case.  
Hil. 5 Ann.

So shooting of a gun, which in itself is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured, this action was held to lie.

In treating of this action, I shall first consider the general nature and description of the action: 2d, The particular injuries for which it lies: 3d, The pleadings: 4th, The evidence: and 5th, The verdict, judgment, &c.

## I. OF THE GENERAL NATURE OF THIS ACTION.

1. "It is not necessary to maintain this action, that the injury which the plaintiff has sustained has arisen *from some act* of the defendant; for the action equally lies where the injury has been caused *by the neglect or culpable omission* of any duty it was incumbent on the defendant to perform."

Finch's Law  
188.

As if one retains an attorney to conduct his suit, and in consequence of any neglect the party suffers any loss, this action lies against the attorney for such neglect.

So if a person suffers the ditch which borders his neighbour's land to become so foul that the water will not run, whereby his neighbour's land is overflowed, this action lies for such culpable omission of what he was bound by law to do. Hale on P. M. R. 427.

“ But in order to charge a person in this action for any neglect, the law must have imposed a duty on him, so as to make that neglect culpable.”

As if a person finds any thing, he is under no obligation by law to keep it safely; and if it therefore is spoiled while in his possession, yet no action lies; for there was no duty by law on him to apply any degree of care. *Mulgrave v. Eden*. Cro. Elis. 219.

2. “ It is no excuse for a defendant in this action, that the injury was involuntary on his part; for if any damage is caused to another, from the folly or want of due care and caution in such defendant, this action lies.”

As if a person brings an unruly horse to break in a place of public resort, though he might not intend to do an injury to any person, yet if any one is kicked or otherwise hurt by the horse, he shall have this action: for it was folly and want of care to bring him to such a place for such a purpose. *Michael v. Alestree*. 2 Lev. 72.

“ So neither is it any excuse for an unlawful act, that by proper attention the person who receives the injury might have avoided it.”

As if a person lays logs of wood across the highway, through which by proper care a person might ride with safety; yet if the horse stumbles over them, and the person be thrown, he may recover in this action for the injury. *Fowler v. Saunders*. Cro. Jac. 446.

3. “ But if the injury which the party has sustained has arisen from his own neglect and folly, and so might have been avoided, this action will not lie.”

As where the plaintiff declared, that he was employed by the defendant to carry a load of timber from Woodbridge to Ipswich, to be laid down where the defendant should appoint, and that he carried it; when the defendant having appointed no place where it was to have been laid down, that the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled: after a verdict for the plaintiff, judgment was arrested; for it was the plaintiff's own fault that he did not take out his horses, and lead them about, or might have unloaded the timber in any proper place, and have returned.” *Virtue v. Bird*. 2 Lev. 196.

Ca. Lkt.

4. "Wherever a right is of a public nature; that is, is common to all the king's subjects, the mere depriving the public of that right, will not subject the party to an action, for so would actions be without end; the remedy is by information or indictment: but if any individual suffers a particular injury in consequence of being deprived of such right, he may have his action on the case."

Payne v.  
Partridge.  
1 Salk. 12.

As where the plaintiff brought this action against the defendant, as owner of a *common ferry*, to which by prescription the plaintiff as an inhabitant of *Littleport*, had a right to pass *toll-free*, and the action was for refusing to ferry him over, it was held not to lie, for the right of being ferried over was common to all the king's subjects; and for being deprived of that, no remedy lies *without special damage*, which here the plaintiff has not laid; but he might have had his action for *taking toll* from him, he having a particular exemption; but on that he did not declare.

"So where the matter is of a public nature, though confined to a certain body, this action will not lie, without a special injury."

Williams's case.  
5 Co. 72. b.

As where the plaintiff declared, that in a certain chapel of ease within the manor of *Wolkeston*, the defendant was bound as vicar of *Alderbury*, to celebrate divine service and administer the sacrament to the plaintiff, and his tenants and servants within the said manor; and the action was for the not so celebrating divine service in such chapel of ease: after a verdict for the plaintiff, judgment was arrested; for the chapel being public and common to all the tenants of the manor, then every tenant might have this action, which could not be; but the remedy should be in the spiritual court.

Anon.  
1 Ld. Raym.  
739.  
2 Salk. 441.  
S. C.

5. "It is to be observed on this action, that any person employing another in any office or employment, is answerable for his misconduct or neglect, or for any injury which he may occasion; therefore a master shall answer for the misconduct of his servant."

Jarvis v. Hayes.  
2 Stra. 1004.

As where an action was brought against the master, for his servant with his cart having run against the cart of the plaintiff in which was a pipe of wine, which was overturned and spilt, the plaintiff recovered.

## 2. OF THE PARTICULAR INJURIES FOR WHICH THIS ACTION LIES.

These are divisible into injuries, 1. To the person: 2. To personal property: 3. To real property, or chattels real: 4. To personal rights, not properly reducible to any particular head.

Of each of which in their order.

### 1. OF INJURIES TO THE PERSON.

1. If a person undertakes the cure of any wound or disease, <sup>1 Danv. 77.</sup> and by neglect or ignorance the party is not cured, or suffers materially in his health, he may recover damages in this action; <sup>Dr. Groenvelt's case.</sup> but the person must be a common surgeon, or one who makes <sup>2 Lord Raym. 214.</sup> public profession of such business, as surgeon, apothecary, &c. for otherwise it was the plaintiff's own folly to trust to an unskilful person, unless such person expressly undertook the cure.

"And it seems that any deviation from the established mode of practice, shall be deemed sufficient to charge the surgeon, &c. in case of any injury arising to the patient."

For upon this ground an action was adjudged to lie against Slater v. Baker the surgeon and apothecary, for breaking the callus of the plaintiff's leg after it had been set; it appearing that it was done unskilfully, and out of the common course of practice, and for the sake of making an experiment with a new instrument. <sup>& Stapleton. 2 Will. 359.</sup>

2. "If the health of any person is impaired in consequence of <sup>1 Roll Ab. 90.</sup> the act of another, as selling him bad wine, which injures the party's health, this action will lie; so for exercising a noisome trade in the neighbourhood, which produces the same bad effects."

As where the action was brought for erecting a brew-house <sup>Jones v. Powell.</sup> and burning sea-coal, by which the air was infected: so for erecting a tallow-furnace, to the annoyance by the smell of <sup>Hutt. 135.</sup> the plaintiff's house and family, and loss of business in consequence: in these cases the plaintiff had redress by action on <sup>Morley v. Pragnell.</sup> the case. <sup>Cro. Car. 510.</sup>

3. "If any person keeps a dog which is used to bite, this action will lie against the owner, at the suit of any person whom the dog has bitten."

But

Mason v.  
Keeling.  
1 Lord Raym.  
606.

But the owner must have notice that the dog was used to bite; for though if a man keeps animals *feræ naturæ*, as lions or bears at large, without proper care, he is answerable for any mischief they do, though without notice, yet dogs being *mansuetæ naturæ*, the owner must have notice of their viciousness, or he will not be liable: and it is therefore matter of substance to set out the notice in the declaration.

Buxenden v.  
Sharp.  
2 Salk. 662.

Smith v. Pelah.  
1 Stra. 1264.

Therefore where a dog had once bitten a man, and the owner still let him go at large, though he had notice of the dog's having bitten the person, and he afterwards bit another person, this action was adjudged to lie against the owner of the dog, though it appeared that the person who received the injury had trod on the dog's toes; for the owner should have hanged him on the first notice, and the king's subjects are not to be endangered.

Belton v. Banks.  
Cro. Car. 254.

2. So an action will lie against the owner of a dog used to bite sheep, for killing any, after notice to the master.

Kinnion v.  
Davies.  
Cro. Car. 487.

And it is sufficient to support the *scienter* in this action, that the dog had once done so before.

Jenkins v.  
Turner  
1 Lord Raym.  
118.

And if one has a dog used to bite sheep, and he bites a horse, it is actionable; for the owner after notice of the first mischief done, should have destroyed the dog, to prevent further injury.

But these latter cases more properly belong to the head of Injuries to Personal Property.

## 2. OF INJURIES TO PERSONAL PROPERTY.

Under this head I shall consider, 1. Such injuries as are to personal property, from the misconduct or negligence of officers: 2d, Of private persons.

Under the class of officers, I include, 1. Sheriffs, and their inferior officers: 2. Attornies: 3. Justices of the peace.

### 1. OF INJURIES BY SHERIFFS, OR THEIR INFERIOR OFFICERS.

Under this head it is previously to be observed,

1. "That as the office of sheriff partakes of a *judicial* as well as a *ministerial* function, wherever the sheriff is acting in his *judicial capacity*, no action will lie for any misconduct in it, where no fraud or corruption appears."



As where the plaintiff declared against the defendants as sheriffs of *York*; that time out of mind there had been a court of record held before the sheriffs, where actions of debt had used to be brought, and the defendants in such actions arrested, and held to bail by the said sheriffs; and that the sheriffs were also from time immemorial keepers of the gaol; and the action was against the sheriffs for taking insufficient bail; the court held, That the two authorities concurring, they would hold the act to be done by them as *judges*, and that the action would not lie. Metcalfe v. Hodgson & alts. Hutt. 120.

2. If there are two sheriffs, and an action is brought against them for any misconduct in their office, and one of them dies before the trial; yet shall the action survive against the other as in other actions of trespass, the *tort* being several as well as joint. Watson v. Ben- nison & Elfwick. Cro. Eliz. 603.

3. "Where a *tort* has been committed by any officer of *Salk.* 12 the sheriff, the party injured may have his action either against the sheriff or against the officer (as in the case of a voluntary escape); but where the injury is caused by a neglect or breach of duty in any of the officers of the sheriff, the action must be brought against the sheriff himself."

As where the action was against the under-sheriff for *em- Bezzling a writ*, this being a *tort*, was adjudged to lie against the under-sheriff. Marsh v. Asty. Cro. Eliz. 175.

But where it was against the under-sheriff for *not executing a bill of sale to a nominee of the plaintiff's*, of certain goods taken in execution, in pursuance of a promise; this action was held not to lie, it should have been brought against the sheriff as a breach of duty of office; but in fact, the under-sheriff is not bound to make such bill of sale, the legal mode being by writ of *venditioni exponas*, therefore the action would lie in no case. Cameron v. Reynolds. Cowp. 403.

The principal cases in which this action lies against the sheriff or his officers, may be reduced to four heads.

1. That of escapes: 2. That of rescues: 3. Of improper or informal executions: 4. Of false return.

#### And 1st. Of Escapes.

Under this head, I shall consider, 1. What shall be deemed a legal arrest, so as to subject the sheriff and his officers; for unless the arrest is legal, this action will not lie: 2. What shall be deemed an escape: 3. In what cases, and how far the sheriff shall be liable: 4. What shall excuse him, and how he may have redress.

1. What

## 1. What shall be deemed a legal Arrest.

Genner v.  
Sparks.  
1 Salk. 79.

1. *Bare words* will not make an arrest; there must be an *actual touching of the body*, or, what is *tantamount*, a power of taking immediate possession of the body, and the party's submission thereto: and therefore in this case where the bailiff said to the defendant against whom he had the writ, he being at some distance, that he arrested him by a warrant he had against him; and the defendant having a fork in his hand, kept the bailiff at a distance till he retreated into the house, it was held to be no arrest.

Horne v. Bat-  
tyn.  
Hill. 12 G. 2.  
B. R.  
Bull. N. p. 62.

But where a bailiff having a writ against a person, met him on horseback, and said to him, "you are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him; but if on the bailiff's saying those words he had fled, it had been no arrest, unless the bailiff had laid hold of him.

Blatch v.  
Archer.  
Cowp. 64.

2. The arrest must be *by authority of the bailiff, to whom the warrant is directed*; that is, he must be in company, but he need not be the hand that arrests, nor present, nor in the sight of the party arrested: as here where he sent his follower forward, who made the arrest, he being at some distance, and out of sight, the arrest was held to be good.

S. C. Ibid.

3. The arrest by the bailiff must be *by virtue of a warrant signed and sealed by the sheriff*; a verbal authority is not sufficient.

Hodges v.  
Marks.  
Cro. Jac. 485.

4. The bailiff when he makes the arrest need *not shew his warrant*, nor tell at whose suit the writ is, unless the party demands it: and if the bailiff has two warrants in his pocket, and produces neither, if the prisoner be rescued, either party at whose suit the warrants were, may bring his action and recover.

Semaine's case.  
5 Co. 92.

5. It is not lawful to *break open doors* to make an arrest in any case of civil process, for the law will not allow such breach of the peace.

Park v. Evans.  
Hob. 62.

Therefore where bailiffs rapt at a door, and on its being opened to see who was there, rushed forcibly in with their swords drawn, the entry and arrest were held to be unlawful.

Lee v. Gansel.  
Cowp. 1.

But if the bailiff *finds the outer door open*, and enters peaceably, he may *break open the inner doors* to make an arrest; and this was held so in the present case, where the defendant was

was a *lodger*, whose room it was contended was his dwelling-house.

So where the outer door was a *batch door*, the upper part of which was open, but the lower bolted at top and bottom, the officer unbolted the top; and not being able to reach the bottom, *leapt over it*, and unbolted it, and let in the others: it was ruled by Just. *Wilmot*, That this entry was lawful. Maxwell v. King. Reading Lent Ass. 1766. MSS.

But though a person has been illegally arrested, as here by the bailiff's breaking into the house, yet if *while in such illegal custody he is fairly charged with another arrest*, such last arrest shall be good: but there must be no fraud or collusion, first to arrest the party unlawfully, and then charge him with another action. Howson v. Walker. 2 Black. Rep. 823.

6. "By stat. 29 Car. 2. c. 7. §. 6. no arrest shall be made on a *Sunday*, except in case of treason, felony, or breach of the peace."

An arrest on this day is therefore absolutely void, inasmuch that the party arrested may maintain an action of false imprisonment in consequence of it. Wilson v. Tucker. Salk. 78.

1. But a person may be *retaken on a Sunday* by virtue of an escape-warrant. This is now enacted by statute 5 Ann. c. 9. Parker v. Sir Wm. Moor. Salk. 626.

2. The bail may take their principal on a *Sunday*, and surrender him the next day.

3. But a conviction on a statute, and an order of committal to the house of correction, the party having no goods, is not a criminal proceeding within the statute to allow an arrest on a *Sunday*; but such is void. Rex v. Myers. 1 Term. Rep. 265.

7. The writ to arrest should be within the proper county; for where a person was arrested by a bill of *Middlesex* in another county, the proceedings were set aside for irregularity. Devenage v. Dalby. Doug. 369.

8. If a person is in custody of the sheriff for one cause, *delivering to him a writ against the same person for another cause*, is a good arrest; as here, where he was in on a *ca. ad resp.* delivering a *cap. utlag.* was held good, and to subject the sheriff on an escape. Frost's case. 5 Co. 89.

## 2. What shall be deemed an Escape.

1. "Imprisonment making part of the debtor's punishment, against whom a judgment was had, and who could not pay, if after the defendant had been committed to prison

"prison *en d'espier ad satisfaciendum* he was seen at large; it was at all times deemed an escape in the sheriff."

Baldon v.  
Temple.  
Hob. 102.

For where in debt against the sheriff of *Bucks* for escape, the escape assigned was, that a person in prison at the suit of the plaintiff was suffered to walk at large through the town, though attended by a keeper, it was adjudged such an escape as subjected the sheriff; and the plaintiff had judgment.

3 Black.  
Comm. 475.

2. "But to persons taken on mesne process only, the sheriff might shew them what indulgence he pleased; provided he had them forthcoming at the return of the writ."

But that is now altered in the case of the warden of the Fleet, and the marshal of *K. E.* by stat. 8 & 9 *W. 3. c. 27.* which enacts "That the warden of the Fleet, or marshal of the King's Bench prison, suffering any person committed on mesne process or execution to go at large, except on *habeas corpus* or rule of court, shall be deemed an escape."

Per Ashurst, J.  
Atkinson v.  
Mattinson.  
2 Tether. Rep.  
172.

So that still the officer may permit the person arrested to go at large, provided he has him at the return of the writ; but in the case of final process, he cannot for a minute:

3. By the same statute it is further enacted, "That if the marshal or keeper of any prison shall, after one day's notice in writing, refuse to shew any prisoner in execution to the creditor at whose suit such prisoner was charged, or to his attorney, such refusal shall be deemed an escape."

3 Co. 71.

4. "Where a new sheriff is appointed, his predecessor in office should hand over to him all the prisoners in his custody with their respective executions; and if he omits any, it is an escape, and this should be done by indenture." *Cro. El.* 366.

Westby's case.  
3 Co. 71.

For where the prisoner, for whose escape this action was brought, had been in the custody of the former sheriffs, at the suit of the plaintiff, and also of one Dighton, and in the indenture containing the names, &c. of the prisoners, the execution at the suit of Dighton only was mentioned; and the prisoner escaped; it was adjudged, That the former sheriffs were liable for the escape as to the plaintiff's execution; for being delivered over for one cause, he was out of execution for the other; and so it was an escape immediately in the old sheriffs.

And if the former sheriff dies, the successor must at his peril take notice of all the persons in custody, and their respective executions; but till a new sheriff is appointed, the under-sheriff is to take charge of the prison, and is made liable by statute 3 Geo. 1. c. 15. But in such case the assignment by the under-sheriff need not be by indenture.

"But in no case shall the sheriff be liable, except the person who has escaped has been in actual custody; that is, unless legally arrested by his own officers, handed over to him in the gaol by the former sheriff, or regularly delivered into custody." Barnes 259.

And, 1st, "He must have been legally arrested by the sheriff's own officers."

For where the plaintiff, having taken out a *capias ad satissaciendum* against the defendants, sent it to Painter, his agent in Cornwall, he applied to the sheriff for a warrant, directed to Painter's own clerk, assigning as a reason for not applying to the under-sheriff, that the under-sheriff was attorney for one of the defendants; the sheriff after some objection, granted a warrant to Rogers, Painter's clerk, who arrested, and suffered the defendant to escape; it was held, That the sheriff was not liable in this case, nor in any case where a special bailiff is appointed on the nomination of the plaintiff himself; for he must take the consequence of all his acts, particularly as by such means the sheriff might be charged either by their fraud or neglect. De Moranda v. Dunkin. 4 Term Rep. 120.

2. "Or he must be handed over in gaol by the former sheriff."

For where the old sheriff had a person in custody in a private house, and would there have assigned him over to the new sheriff, who refused to accept him, and the prisoner escaped, it was adjudged to be an escape in the old sheriff, but not in the new; for the prisoners can only be assigned in the common gaol. Dawbridge v. Cro. Eliz. 366.

3. "Or he must be regularly delivered into custody, in order to subject the officer to an escape."

For where the prisoner was out on bail, and came and surrendered himself in discharge of his bail, by entering a *reddidit se* in the judge's book, the plaintiff's attorney accepted him in execution, and filed a *committitur* with the officer, and afterwards the prisoner escaped: this action was held not to lie against the marshal, for he was not chargeable without notice, which should be done either by serving him with a rule or entering a *committitur* also in his book. Watson v. Salk. 272.

Bootman v.  
Lord Surry.  
2 Term Rep. 5.  
Boyton's case  
3 Co. 42.

5. Where the bailiff of a liberty, having return of writs and execution on them, *brings a prisoner taken in execution out of his liberty to lodge him in the county gaol*, it is an escape, and shall subject the bailiff.

Wilkinson v.  
Salter & al.  
Cas. Temp.  
Hard. 311.

6. Where the sheriff *appointed a prisoner turnkey of the prison*, it was held to be a voluntary escape.

### 3. In what Cases and how far the Sheriff is liable.

1. By stat. 8. & 9. W. 3. c. 27. §. 9. "If any person desiring to charge another with any action or execution, shall desire to be informed by the keeper of any prison, whether such person is a prisoner there or not, the keeper shall give a true note in writing to such person or his attorney, under the penalty of 50l. and such note acknowledging the person to be there, shall be sufficient evidence that such person is in actual custody."

Jackson v.  
Humphrys.  
Salk. 274.

When a person is acknowledged to be in actual custody, *delivering a writ to the sheriff against such person is an arrest in law*, and will subject the sheriff or officer in case of an escape.

2. "The sheriff is only answerable for an escape from himself, or from some of his officers."

Mayor and Bur-  
gesses of Wind-  
sor's case.  
Cro. Eliz. 26.  
Ante, fol. 607.  
S. P.

For where a *ca. sa.* was awarded to the sheriff of Berks, to take the body of *J. S.* who was then in custody of the mayor and burgesses of Windsor, and it being a liberty, he made his man-date out, directed to them as bailiffs of the liberty; afterwards *J. S.* escaped, and the action was adjudged to lie not against the sheriff, but against the mayor, &c. *they not being officers of his.*

Bonner v.  
Stokely.  
Cro. Eliz. 652.  
Cook qui tam v.  
Champneys.  
2 Stra. 901.  
Sercole v.  
Hanfon.  
1 Will. 3.

3. If the defendant is in custody of the sheriff, taken under a *capias utlag.* on an outlawry on mesne process, yet if the sheriff suffers him to escape, this action will lie: For though in fact the party is in custody at the suit of the king, and the plaintiff has no interest in his body, yet as the outlawry will not be reversed without security given to appear to a new original, his escape is an injury to the plaintiff, and so the action lies.

4. "A distinction is to be observed between process which is *void*, and which is *erroneous*."

"For where the process is void, no action will lie against the sheriff for an escape; but it will where the process has been erroneous, or irregular only."

The

The sheriff in this case had the defendant in custody on a *ca. sa.* which had issued after the year and day without a *scire facias*, and the defendant escaped, the sheriff was held to be liable, and that he could not take advantage of this irregularity; but it had been otherwise had the arrest been made on a *cap. ad respond.* tested of Trinity, and returnable the Hilary term following; for such process must be returnable from term to term, or it is out of court.

Shirley v. Wright.  
Salk. 273.  
Bustie's case.  
Cro. Eliz. 188.  
S. P.

So where the arrest is founded on a *void judgment*, the plaintiff cannot recover for an escape; but it is otherwise where the judgment is only *erroneous*.

Gold v. Strode.  
Carth. 148.

"And wherever the court which gives the judgment has jurisdiction, the judgment may be erroneous, but is not void; but if the court has no jurisdiction, the judgment is void."

Ibid.

Therefore where a *ca. sa.* was executed on a judgment of an inferior court, in debt on a bond made *extra jurisdictionem*, and the defendant had escaped, the court held that an action would not lie against the sheriff.

Anon.  
March 8.

And the reason why the sheriff is charged in one case and not in the other is, that though the process is erroneous, yet the sheriff may justify under it in an action for false imprisonment; and as he may therefore protect himself by such means, he shall be charged.

Therefore on a recognizance in chancery, consuee having sued execution by *ca. sa.* under which consuee was arrested and escaped, it was adjudged, That though the *ca. sa.* was erroneously awarded, yet that while it continued unreversed it was a good execution for the party, and the sheriff was liable.

Coniers Sheriff of Durham's case.  
Cro. Eliz. 576.  
Weaver v. Clifford.  
Cro. Jac. 31.

## 2. How far the Sheriff is liable.

Trespass on the case lies in cases of escapes on *mesne process* in which the debt or damages not being ascertained, the plaintiff recovers in this action damages for losing the benefit of his action, which are uncertain; but where the party has been in custody in execution, wherein the debt and damages are liquidated, there, under the stat. West. 2. and 1 Ric. c. 12. the whole are recoverable in an action of debt, with this exception, that where the plaintiff had execution on a statute of lands, goods, and body, and the prisoner escaped, as the lands remained in execution, debt would not lie, but trespass on the case.

Br. Ab. 19.  
2 Inst. 382.  
Petty v. North.  
Cro. Eliz. 17.  
2 Stra. 873.

But if the party proceeds by action of debt against the sheriff or gaoler for an escape, the jury cannot give a less sum

Bonafous v. Walker.  
2 Term. Rep. 126. 1 Ref.

*sum than the creditor would have recovered against the prisoner; that is, the sum indorsed on the writ, and the legal fees of execution.*

Reading v.  
Edwin and Fleet  
Carth. 145.

And note, That if the party escapes out of one of the counters, the action shall be brought against both sheriffs; not against him only from whose counter the escape was made, for the two persons make but one sheriff.

#### 4. What shall excuse the Sheriff, and how he shall have Redress.

1. "The first case I shall consider in which the sheriff shall be excused for an escape, is the case of *rescues*.

May v. Proby.  
Cro. Jac. 412.

If the sheriff arrests a person on *mesne process*, and he is rescued in going to gaol, the sheriff is not liable; for as the sheriff if he meets the party against whom he has such process, is bound to arrest him, if pointed out to him, and so he cannot be supposed to have the *posse comitatus* then with him: *in all cases of mesne process*, on the same principle, *in cases of rescue he shall be excused*.

Sir William  
Clarke's case.  
Cro. Eliz. 873.

1 Roll. Ab. 808.

4 Co. 84. a.  
1 Roll. ibid.

Year B. 33.  
H. 6. 1.

But if such person be *once within the walls of the prison* after such arrest on *mesne process*, the sheriff shall in all cases be liable, except where the rescue is by the king's enemies, or the escape by reason of fire: but if a party of *rebels or traitors* breaks the prison and lets the prisoners at large, the sheriff is liable on this ground, that he may always command the *posse comitatus*, and no power shall be presumed greater than that, except common enemies; besides, he may have remedy against traitors or rebels by law, but not against common enemies.

1 Roll. Abr.  
808.

And the law is the same in the case of arrests on *fine process*.

"For wherever the sheriff has time to prepare the *posse comitatus*, he shall be liable in case of a rescue."

Crompton v.  
Ward.  
2 Stra. 482

Therefore where the sheriff was ordered to bring up the body in custody on *mesne process*, by *habeas corpus*, and defendant was rescued in going to court, the sheriff was held to be liable; for the sheriff having had notice when the body was to be brought up, he might have provided against a rescue by assembling the *posse comitatus*.

Mynn v.  
Coughton.  
Cro. Car. 109.  
Congham's case.  
Hutt. 98.

"And in the case of a rescue, the party at whose suit the arrest was made may maintain his action either against the sheriff or against the rescuers. If, therefore, he elects to proceed against the rescuers, it should seem that the sheriff was discharged."

2. "A



2. "A second ground of excuse for the sheriff, in case of  
"an escape, is a *recaption upon a fresh suit*."

But 1st. In the case of *voluntary escapes*, the gaoler cannot *5 Co. 52 b.*  
retake the prisoner; but the plaintiff may by an escape-war- *Per Wilmot.*  
rant, and proceed against him to judgment or against the *C. J.*  
gaoler. This is in the case of *mesne process*. *2 Will. 295.*

For all *writs of mesne process* must be returnable in the *same* *Shirley v.*  
*or next term*; and if a term is omitted, the writ is void, for *Wright.*  
so the defendant might be kept unreasonably long in prison: *2 Salk. 700.*  
But *writs of final process* need not be returnable the next term;  
for the cause is at an end, and the party has no day in court.

But if the party so suffered to escape *was in execution*, the *Lenthall v.*  
plaintiff may retake him after the twelvemonth without a *scire* *Gardiner.*  
*facias*, for he is in on the first execution. *Hill. 26 Car. 2.*  
*Bull. N. P. 69.*

And this though the plaintiff had recovered in an action *Collop v.*  
against the gaoler, if the sum recovered was less than the *Brandley.*  
debt. *Trin. 31*  
*Car. 2.*  
*Bull. N. P. 69.*

But in the case of *negligent escapes*, the gaoler may at any *Willing v. Goad*  
time retake the prisoner; though if the defendant escapes out *2 Stra. 908.*  
of prison, and the plaintiff sends a discharge while he is so at  
large, the gaoler cannot justify *retaking him for his fees*.

2. The prisoner must be taken *on fresh suit* to excuse the *Ridgeway's case.*  
sheriff; and though *he may have been out of sight* (as in this *3 Co. 52.*  
case, for a day and a night) yet may the recaption be deemed  
fresh suit, and the sheriff be excused; and though the pri-  
soner might have fled into another county, yet may the sheriff  
there retake him on a fresh suit.

But the recaption must be before action brought, or it shall *Whitting v.*  
not be deemed fresh suit; for where it appeared that the recap- *Sir J. Reynell.*  
tion was not till after the action had been commenced, the *Cro. Eliz. 657.*  
marshal was held to be liable for the escape from his pri- *Stonehouse v.*  
son. *Mullins.*  
*2 Stra. 873.*

And in this case the recaption was on the *same day* of com- *Bail v. Briggs.*  
mencing the action, and the officer was held not to be dis- *1 Jones. 145.*  
charged, the action being attached in the plaintiff.

So if the escape was involuntary, and the party returns *Chambers v.*  
of himself before action brought, and is in prison, it shall *Gambier.*  
excuse the officer; for it is tantamount to a recaption on *Com. Rep. 554.*  
fresh suit. *2 Term Rep.*  
*126.*

3. "In general, to charge the sheriff or his officers with  
"an escape, it must have proceeded either from conniv-  
"ance,

ance, from neglect, or want of due care, and therefore in  
 "all cases where the sheriff or his officers are acting under  
 "proper authority, and an escape happens, he is excused."

Vaſt v. Gaudy.  
 Cro. Eliz. 5.

Therefore where in an action for an escape against the marshal, he gave in evidence that the person in prison had been *let out to bail by order of the court*, to prosecute the taint; it was held a good justification; for it was not done out of his own head, but by command of the justices.

Bonafous v.  
 Walker.  
 2 Term Rep.  
 126.

An escape of a prisoner in the custody of the marshal, *from the rules of the King's Bench Prison*, is a negligent and not a voluntary escape; for by stat. 8, 9 IV. 3. 27. The marshal has a right to permit a prisoner to go within the rules.

4. "As in the case of voluntary escapes, the action lies  
 "against the officer permitting it, the sheriff seems thereby to  
 "be discharged if the party proceeds against the officer."

Ravenscroft v.  
 Eyles.  
 2 Will. 294.

And wherever the gaoler suffers a voluntary escape, from that moment he is a wrong-doer, and though the *original defendant returns*, and the plaintiff proceeds against him to judgment after his return, yet it is no waiver of the action against the gaoler; but he may still be sued for damages.

5. "And in the case of a voluntary escape, no subsequent  
 "assent of the plaintiff in the action shall purge it."

Scott v.  
 Peacock.  
 Salk. 271.

For where to a *sci. fa. quare executio non*, &c. upon a judgment, the defendant pleaded, that he had formerly been taken in execution on a *ca. fa.* upon the same judgment, and by the sheriff suffered to escape, *to which escape the plaintiff assented*; it was held no plea, for the subsequent assent could not make it an escape with the consent of the plaintiff; but that he may either sue the sheriff or retake the party.

## 2. How far the Sheriff shall have Redress.

Sulston and  
 Offley v. Paine.  
 Cro. Eliz. 234.

1. If the party in custody, on execution or otherwise, escapes, the sheriff may have an action of trespass on the case *against him*, for the sheriff is liable over to the plaintiff in the first action.

Morris v.  
 Berkley.  
 Worcester Lent  
 Ass. 1765.  
 MSS.

So in an action against a prisoner for an escape, Just. Yates ruled, That if a sheriff voluntarily permits a prisoner to escape, and he in consequence is obliged to pay the debt, he may maintain an action for money paid, laid out, and expended against the defendant, for he is discharged as against the plaintiff in the action; and he said that the same point had been so ruled by himself and Just. Gould on the western circuit.

And this action is maintainable by the sheriff against the person escaping, *though he himself has not been sued on the escape*: For the party arrested did a wrong by the escape, and the sheriff is always liable to the plaintiff in the original action: and perhaps the person escaping might die, or leave the country before the sheriff was sued, and so he would lose his remedy.

Sheriffs of Norwich v. Bradshaw.  
Cro. Eliz. 53.

2. But the *bailiff* who made the arrest, and from whom an escape has been made, *cannot have case against the person escaping*, even though the sheriff has recovered against him; for he is not chargeable to the sheriff *by law*, but upon his own undertaking; and therefore as no responsibility is by law annexed to his office, the law gives him no remedy, as the wrong was not done to him but *to the sheriff*.

Atherton v. Harward.  
Cro. Eliz. 349.

Having considered the cases of escapes and rescues, I shall now consider those on improper and informal executions.

### 3. Of Improper or Informal Executions.

1. By statute 8 Ann. c. 17. § 1. "No goods shall be taken in execution, unless the party at whose suit the execution or extent is sued out, before the removal of the goods, shall pay to the landlord or his bailiff one year's rent (if due) and the sheriff or other officer is impowered to levy the money so paid for rent as well as the execution, and pay it over to the plaintiff."

If therefore the sheriff takes goods in execution, and removes them off the premises before the landlord has been satisfied for the year's rent (*he having got notice* that the rent was due) an action on the case lies against him, either at the suit of the landlord himself, or, in case he is dead, of his executor or administrator, it being an injury to the estate.

Palgrave v. Windham  
1 Stra. 212.  
2 Will. 141.

But these decisions are to be observed:

1. That the payment must be made by the plaintiff in the action: and the sheriff should not proceed in the execution till the rent is paid.

2. The landlord must be paid *his whole year's rent*; that is, without deduction of poundage for sheriff's fees.

Gore v. Goston.  
1 Stra. 643.

3. "The statute extends only to the case of *the immediate lessor* of the defendant."

For where the lessee had under-let, and the under-lessee's goods were taken in execution, the court held, That the ground-landlord (that is, the first lessor) had no claim under the

Cafe of James Bennet, Esq.  
2 Str. 787.

the statute to one year's rent, as against the estate of the *under-lessee*, but that it was confined only to his lessor, who was the original lessee.

4. "The statute extends to all cases of execution by *fi. fa.*"

Henchett v.  
Kempson.  
2 Will. 140.

For where the *defendant* had judgment as in case of a non-suit, and took out a *fi. fa.* for his costs, it was adjudged, That the landlord should be paid his rent before the execution was served, though it was contested, that the statute only extended to cases of executions taken out by the *plaintiff*.

5. "But the sheriff must in all cases *have notice* of the rent "being in arrear, or he is not liable after he has levied the "money."

Waring v.  
Dewberry,  
1 Stra. 92.

For where the lessee was in arrear of rent, and the lessor died, and before administration granted a *fi. fa.* issued, and was executed by the sheriff on the goods of the lessee; and afterwards administration was granted, it was adjudged, That as there was no one to whom payment of the rent could be made when the execution was levied, and the sheriff was not obliged to retain, the administrator was without remedy, and particularly as the notice of rent-arrear ought to come from the landlord.

2 Will. 141.

But in these cases, if the sheriff has levied the goods, the landlord may avoid an action, by *getting a rule of court on the sheriff to pay him out of the money levied.*

2. "Another case in which the sheriff is liable to an action "under this head is this:"

Smallcombe v.  
Buckingham.  
Salk. 320.

If two writs of the same *teste* come to the hands of the sheriff, he should by common law execute that first which is first delivered, the goods being bound *from the teste*. But by the statute of frauds, the goods are bound *from the day of delivery*, and so priority of delivery is an advantage. Therefore now whatever be the *teste*, the first delivered ought to have the priority of execution: And therefore, if two writs of *fieri facias* both come to the sheriff on the same day, that which is first delivered must be first executed. If therefore the sheriff executes the last delivered *fi. fa.* first, it is an injury to the plaintiff in the first *fi. fa.* and he may have this action of trespass on the case against the sheriff; but the execution of the second *fi. fa.* is good.

"But in order to charge the sheriff, the first execution "must be *bona fide*."

For

For where in an action against the sheriff, the case was that a *fi. fa* had issued, directed to the defendant at the suit of the plaintiff, against one *Crop*; one *Whiteball* was made special bailiff, and the warrant was made out to him and two others, *Swanton*, the plaintiff's attorney, was present at the execution of it, and said to *Whiteball* to use *Crop* kindly, and not to take his household goods, for that his landlord, one *Earl*, would soon be in the country, and would pay the debts: upon this the bailiff rode round the land, and said "*I seize all this corn and cattle;*" and took some account thereof for the use of the plaintiff. This *fi. fa.* was tested the 11th of *May*, and executed the 14th in the manner mentioned. On the 20th of *May*, *Earl*, *Crop's* landlord, to whom he was indebted upon a judgment, sued out a *fi. fa.* against him; and the sheriff's bailiffs not being in possession of *Crop's* goods, nor having left any body there, *Earl* got his execution executed, and there was no proof that *Earl* promised to pay the plaintiff: in an action against the sheriff, it was decided, That it was proper evidence to be left to the jury, Whether the first execution that came into *Crop's* house was intended to be or really was executed, and not fraudulent? the jury having found it to be so, the defendant had judgment.

3. But where two writs come to the sheriff, if he executes the last delivered first, and levies under it, such sale shall be good as well to the vendee, who shall hold the goods, as to the plaintiff in that writ who shall not be liable to refund the money levied; but the sheriff shall be liable to the plaintiff in the first execution, who had lost the benefit of his execution against the defendant.

But where two writs are so delivered, if the sheriff has seized under the second writ, *but not actually sold*; or if he permits the plaintiff under the second execution to sell, *but with a reservation of the first execution*, in such case the plaintiff under the second execution is not intitled to hold the money levied against the plaintiff in the first.

The last class of injuries for which this action lies against the sheriff or other officers, is that of,

#### 4. False Returns.

1. As where a sheriff returned "*scire feci*" to a *scire facias*, when in fact he had given no notice, this action was adjudged to lie; and that it might be laid in the county where the return was made, and was not confined to the sheriff's own county.

**Powell v. Hord.** So where the sheriff made a false return of *non est inventus*  
1 Stra. 630. to writ of mesne process.

**Hawkins v. Mildmay.** So where the sheriff had directed his warrant to the bailiff  
Cro. Eliz. 729. of a liberty to arrest the party, he made the arrest, and yet the sheriff returned *non est inventus*, and this action was adjudged to lie.

“ But where a sheriff is called on to return a writ in which  
“ the property of the goods may come in question, he may  
“ enquire how the property is circumstanced, and make his  
“ return accordingly.”

**Crosley v. Arkwright.** For where in an action against the defendant, the sheriff  
2 Term Rep. 603. of *Derbyshire*, for a false return, the case was, That a writ of *fi. fa.* issued against the goods of one *Clarke*, certain goods were seized which appeared to be the property of *Clarke*; but it appeared that he claimed them under deed of assignment from one *Allanfon*, who being indebted to *Clarke* in 400l. in consideration of 20l. more advanced, and of an annuity of 25l. *per ann.* for his life, *Allanfon* had assigned all the goods in question to *Clarke*; but *this annuity-deed had never been registered*, and therefore was void under stat. 17 Geo. 3. c. 26. the sheriff had returned *nulla bona*: it was adjudged, That the deed being void for want of being registered, that *Clarke had no property under the assignment*, and that therefore the return was right.

**Sir W. Clark's case.** 2. It seemed the better opinion in this case, That if the  
Cro. Eliz. 873. sheriff makes no return to a writ, that this action will lie.

**Williams v. Grey.** 3. The executor may maintain this action for a false return  
Salk. 12. *in vita testatoris*, but this in the case of *final* only, not in the case of mesne process (as where upon a *fi. fa.* the sheriff returned that he had levied a part, whereas in fact he had levied the whole); for by the levying of the goods a right vested in testator, and so in the executor, as part of testator's estate; but in the case of mesne process, it is a tort which dies with the testator, no property having vested.

4. It is necessary to observe, that some returns are void, though no action will lie on them, they not being false.

**Palmer v. Potter.** As where the return was “ *nulla bona*,” and made *before*  
Cro. Eliz. 512. *the return-day* of the writ, it is void; for though the defendant may have no goods *at the time*, yet he may at the time of the return.

**Lawrence v. Netherfole.** So where the return was that the defendant was attached  
Cro. Eliz. 13. *per catalla ad valentiam* 10l. this was adjudged a void return, for the return should set out *what the cattle were*, so  
that

that they might be forfeited, but upon such a general return none of them could be forfeited.

5. But by stat. 21 Geo. 2. c. 37. §. 2. "No sheriff shall be called upon to make any return to any writ, unless required so to do it within *six months after the expiration of his office.*"

1. The six months are to be *lunar* months.

Rex v. Adderley.

2. The day the sheriff is superseded or goes out of office, is the first day, and reckoned inclusive.

Doug. 446.  
S. C.

3. But a mere request to the sheriff to return the writ is not sufficient; he must be required to make the return *by rule of court*, or he shall not be liable.

Rex v. Jones.  
Trin. 27 G. 3.  
2 Term Rep. 1.

## 2. OF INJURIES BY ATTORNIES.

1. "If in consequence of any neglect, mismanagement, or corruption of the attorney, the client suffers any loss either in his suit or otherwise, he shall recover damages in this action."

As where the defendant was attorney to the plaintiff in a cause wherein the plaintiff had a verdict, and the defendant in that action having been surrendered in discharge of his bail, the attorney *neglected to charge him in execution*, whereby he was discharged, the action was held well to lie against the attorney for such neglect.

"But the damages in this action must not necessarily be to the full amount of the first judgment, and therefore the remedy must be by this action, *not in a summary way.*"

For where in debt, the party was arrested by the defendant who was plaintiff's attorney; but he having neglected to declare against him in two terms, the party was discharged on common bail. The plaintiff applied for an order of court on the attorney, to pay the whole debt; but it was refused: the court saying, That the plaintiff should bring his action regularly against the attorney: for, if the defendant in the first action was in solvent circumstances, the plaintiff might still recover against him, so that the whole sum should not necessarily go in damages against the attorney.

Pitt v. Yalden.  
4 Burr. 2060.

2. Where an attorney takes upon him to appear for another, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.

Anon.

Salk. 86.

3. "But

3. "But the remedy for injuries by this action, is not confined to the *case of attorney and client*: for if in the conduct of *a suit against any person* an attorney is guilty of any dishonest or unwarrantable practices, he is subject to this action at the suit of the party grieved."

Knight v.  
Copping.  
Hutt. 135.

For where the plaintiff had been sued by one *Left*, to whom the present defendant was attorney, which suit had been non-prossed and costs assessed; yet the defendant having knowledge of this, had unduly and maliciously *procured a judgment to be signed against the plaintiff, at the suit of Left, and taken out execution*, under which the plaintiff had been imprisoned until delivered by writ of superseatas, the action was held well to lie.

But this case falls more properly under the head Malicious Prosecution. *Quod vid. Plenius.*

### 3. OF INJURIES BY JUSTICES OF PEACE.

For any breach or neglect of whose duty of office, this action lies against them.

a Hawk. P. C.  
90. 14 H. 7.  
7 H. 19. Hale  
P. C. 97.

1. As if a justice of peace *denies, refuses, or obstructs* bail where it ought to be granted, for such conduct he is liable to an action on the case.

Green v. Hundred of Buccleuch.  
1 Leon. 323.

2. So where the plaintiff was robbed, and he went to a justice of peace to *take his depositions for the purpose of charging the hundred, which the justice refused to take*, whereby the action against the hundred was lost; this action was adjudged to lie against the justice.

### 2. OF INJURIES BY PRIVATE PERSONS.

These are divisible into two heads, 1. To injuries where there has been a trust: 2. Where there has been no trust.

#### 2. Of Injuries where there has been a Trust.

These form the head of *Bailment*.

Bailment is of six kinds.

2 I.d. Raym.  
903.  
Com. Rep. 134.

1. "The first is a naked bailment, to keep for the use of the bailor, without any profit to the bailee: in this case the bailee is not chargeable, *except in case of gross negligence*; mere want of care is not sufficient."

Mytton v. Cock.  
2 Stra. 1099.

As where the plaintiff who was owner of a cartoon, left it with the defendant who was an auctioneer, without any agreement to take care of it to re-deliver it safe, or without any



any agreement for a reward, and the cartoon was spoiled; for which the plaintiff brought this action, when it was adjudged on a motion for a new trial, that it was proper evidence to be left to a jury, Whether the defendant had been guilty of any gross neglect in the keeping of it, for such alone should charge him? and the jury found for the plaintiff on that ground.

So where the defendant, who was a general merchant, being about to export a quantity of leather cut out, the bankrupt applied to him to enter a parcel of the same leather at the customhouse for exportation to the same place; but the defendant was to derive no manner of advantage from it, *but did it merely gratuitously*; the plaintiff entered his own and the other's goods at the customhouse, *but by a wrong denomination*; in consequence of which both parcels were seized, and this action was brought by the assignees to recover damages *for the neglect*: but it was resolved, That the defendant having undertaken gratuitously to act for the defendant, not being to receive any reward, nor being in a situation which necessarily imported skill in that business in which he so undertook for the other, and *having taken the same care which he had done of his own*, that he was not liable to an action for the loss of them.

Shields aff. of  
Goodwin v.  
Blackburn.  
H. Black. Rep.  
158.

2. "The second kind of bailment is, the entrusting of goods to be carried for hire or reward, in which case the bailee is chargeable for any loss: this is the case of carriers."

1. At common law, a carrier is liable by the custom of the realm to make good all losses of goods entrusted to him to carry, except such losses as arise from the *act of God*, or of the *king's enemies*: to which may be added, such as arise from the *default of the party sending them*.

Co. Litt. 89.  
Coggs v.  
Barnard.  
2 Lord Raym.  
909, in which  
case this doctrine  
is examined at  
great length.  
Lane v. Cotton.  
1 Salk. 143.

As if a carrier is *robbed*, he shall be liable for the loss, not on the ground that he may charge the hundred under the statute of *Westminster*, but because, that if it was otherwise, he might by collusion procure himself to be robbed, and *defraud* the owner of the goods; and so in other cases where the grounds are the same.

But 1. *The act of God* shall excuse the carrier.

As where the defendant's hoy, having goods of the plaintiff on board, on coming through the bridge, was by a *sudden gust of wind driven against the arch and sunk*; the owner of the hoy was held not to be liable, the damage having been occasioned by the *act of God*, which no care of the defendant's could provide against or foresee: and though in this case the plaintiff

Amies v.  
Stephens.  
1 Stra. 128.

plaintiff gave in evidence, that if the vessel had been better she would not have sunk in consequence of the stroke, Chief Justice *Pratt* held, That a carrier was not obliged to provide a new carriage for every journey: it is sufficient if he provides one which, without any extraordinary accident, will perform the journey.

*Graves v. Barge.* And upon this ground of its being the act of God, if a bargeman in a tempest, *for the safety of the lives of his passengers, throws over board any trunks or packages of value*, he is not liable for the loss.

“ But if the carrier of *his own accord goes into dangers, from which a loss is likely to accrue*, the act of God shall not excuse him.”

As in the case of *Amies v. Stephens* (*ante* fol. 619.) where it was further held, That if the hoyman had gone to sea voluntarily in bad weather, so that there was a probability of his ship being lost, that he would not have been excused.”

“ But it must fully appear that the loss was occasioned by the act of God, in order to excuse the carrier’s presumption: that it might so have happened will not be sufficient.”

*Forward v. Pittard.*  
1 Term Rep. 27.

For where the defendant, who was a carrier, having lodged his waggon in an inn, an accidental fire broke out, which consumed it; he was adjudged to be liable, though it was contended, that it did not appear in this case *how* the fire broke out; so that it might be by lightning, and so be the act of God.

It was further held in this case, That negligence does not enter into the grounds of this action; for though the carrier uses all proper care, yet in case of a loss he is liable.

2. “ The next exemption from losses by a carrier, is where it is done by the *act of the king’s enemies*; but they must be public enemies, not traitors or felons.”

*Morse v. Bluc.*  
1 Vent. 109.  
2 Lev. 69.  
1 Mod. 85.  
S. C.  
*Barclay v. Higgins.*  
Pasc. 24 Geo. 3. quot.  
1 Term Rep. 33. S. P.

For where it was found on a special verdict, that the plaintiff had delivered to the defendant on board his ship the goods in question, and that there was a sufficient crew for the ship, but that *at night eleven persons boarded the ship as pirates*, under pretence of pressing, and *plundered her of the goods*; it was adjudged, that though by the admiralty law, if the ship is robbed by pirates, the master is discharged; yet that *that* cannot hold in this case, the ship being *infra corpus comitatus*, the defendant was therefore liable; for superior force should not excuse him.

3. “ And

3. "And lastly, *The default of the owner of the goods lost himself, shall exempt the carrier in case of a loss.*"

For where in an action against a carrier for negligently carrying a pipe of wine, which by that means burst, and the wine spilt, it was adjudged good evidence for the defendant that the loss happened while the defendant was driving gently, and *arose from the wine being in a ferment*; so that the loss was occasioned by sending it in that state.

*Ferrar v. Adams.*  
Pasf. 10 Ann.  
per Holt.  
Bull. N. P. 74.

So if a carrier's waggon is full, and yet a person forces his goods on him, and they are lost, the carrier is not liable; for it was the owner's folly to act with so little precaution.

*Lovett v. Hobbs.*  
2 Show. 127.

4. "But for all other accidents and perils the carrier is liable, from whatever cause they proceed."

As where in an action against a barge-master for goods spoiled by water, the defendant proved, that when the goods were put on board, that the vessel was tight, but that the damage was occasioned by a rat's eating out the oakum, through which the water came; it was held to be no excuse.

*Dale v. Hall.*  
1 Will. 281.

2. "But in order to charge the carrier, these circumstances are to be observed:"

1. "The goods must be lost while in the possession of the carrier himself, or in his sole care."

For where the plaintiffs sent their servant with the goods in question on board the vessel, who took charge of them, and they were lost, the defendant was held not to be liable; for the goods were in possession not of the defendant, but of the plaintiffs servants.

*East India Company v. Pullen.*  
2 Stra. 690.

2. "The carrier is liable only so far as he is paid; for he is chargeable by reason of his reward."

For where a man delivered a bag, containing money, to a carrier; and being asked how much it contained, answered 200*l.* for which only he paid, and the carrier gave a receipt accordingly: in fact, the bag contained 400*l.* the carrier was robbed, and he was held to be liable only to the amount of 200*l.* being so much only for which he had received payment.

*Tyley v. Morris.*  
Carth. 485.

3. "Under a general acceptance a carrier is bound for whatever he receives, but under a special acceptance for so much only as he bona fide undertakes to carry."

As if a carrier asks what is in a box, and is told silk; if it be money, and it is lost, the carrier is liable, unless he made

*Drinkwater v. Quennel.*  
Trin. 11, 12  
G. 2. C. B.  
Bull. N. P. 75.

a special

a special acceptance. But the intended cheat may perhaps induce the jury to give less damages than otherwise.

“ But under a special or qualified acceptance he is bound  
“ no farther than he undertakes.”

Gibben v.  
Paynton.  
4 Burr. 2298.

For where the owner of a stage-coach put out an advertisement, “ That he would not be answerable for money, plate, or jewels, above the value of 5l. unless he had notice, and was paid accordingly:” it was adjudged in this case, that all goods so received by this coach were under that special acceptance; and that if money or plate was sent by it, without notice and being paid for, that if lost, the coach-owner was not liable.

Clay v. Willan.  
H. Black. Rep.  
298.

And where an innkeeper published such a notice, that cash, plate, jewels, writings, and other kinds of valuable articles would not be accounted for if lost, of more than 5l. value, unless entered as such, and a penny insurance paid for each pound value: if goods above that sum in value are sent by a person who knows of these conditions, and does not pay the extra sum required, he *shall not recover even to the extent of the 5l. or the sum paid for booking.*

Gibson v.  
Paynton, *supra*.

And note, That the notice in this case was by an advertisement in the newspaper, though it was proved that the plaintiff had been seen reading it; but the court held that notice sufficient; and *per* Justice Yates, A personal communication is not necessary to constitute a special acceptance.

S. C.

2. In this case Lord Mansfield seemed to be of opinion, that in all cases of *sending things of great value*, as money or jewels, by a common carrier, *that the carrier should have notice of it*, and be paid accordingly; contrary to the case of *Titchburn v. White*, 1 Stra. 145. Somewhat similar to that of *Drinkwater v. Quennel*, *ante*.

4. “ A delivery to the *carrier's servant* is a delivery to himself, and shall charge him; but they must be goods such as  
“ it is the custom of the carrier to carry, not out of his line  
“ of business.”

Middleton v.  
Fowler.  
1 Salk. 282.

As where the plaintiff declared, That the defendant was the owner of a stage-coach, in which he had taken a place, and delivered a trunk to the driver of the carriage, for taking care of which he had given him a gratuity; the trunk was lost, and on action brought, C. J. Holt was of opinion, That this action did not lie against the master, for that a *stage-coachman* was not within the custom as a carrier, *unless*  
be

*he takes a distinct price for the carriage of goods; for his business is only to carry persons.* Here was no price paid, the money given to the coachman being but a gratuity, not a price for the carriage; and the master is bound for the act of his servant only while he acts in pursuance of his authority.

5. "Where goods are lost which have been put on board a ship, the action may be brought either against the master or against the owners."

For the owners are liable in respect of the freight, and having employed the master; for whoever employs another is answerable for him, and undertakes for him, and the master is chargeable on the same ground; for he may have an action for the freight. But if an action is brought against the owners, *they should all be joined in the action, for it is quasi ex contractu* as to all.

*Boson v. Sandford.*

*2 Salk. 440.*

Though if one only is sued, he must *plead it in abatement* that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff.

*Rice v. Shute.*  
*5 Burr. 2611.*

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu* while immediately under his care; for he is *bound to deliver them* to the consignee, or send notice to him according to the direction: and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable.

*Golding v.*

*Manning.*

*3 Will. 429.*

*2 Blackit. Rep.*

*916. S. C.*

And the law is the same in the case of *letters*, which the post-master *must deliver* at the houses of the inhabitants within the post-town.

*Browning v.*

*Goodchild*

*3 Will. 443.*

And note, That either consignor or consignee may bring the action for goods lost, against the carrier; and if the action is brought by the consignor, the objection that the property is in the consignee does not lie in the mouth of the carrier; for the property is no part of the question as to him, and particularly if the agreement for payment was with the consignor.

*Davis v. James.*

*3 Burr. 2680.*

7. "But, in order to charge a person for goods lost when committed to him to carry, it must appear that the person was a carrier, and the goods in the way of his business."

For where the case was, That the defendants received certain goods to be forwarded from *Stourport* to *Stockport*, by the way of *Manchester*, to which place the defendants were carriers; the goods were by them forwarded safely to

*Garfield v. Proprietors of the Trent Navigation.*

*4 Term Rep.*

*581.*

*Manchester*; it appeared, that according to the course of business, that when goods are to be forwarded beyond *Manchester*, if there is any carrier from the place of their destination in *Manchester* when they arrive, that they are delivered to him on payment of the carriage to *Manchester*; but that if not, that the defendants keep them in their warehouses, without charging any thing for keeping them, till a carrier arrives to whom they may be delivered: the goods in question arrived at *Manchester* on the thirtieth of *September*: there was then no carrier there from *Stockport*, upon which they were housed in the defendants warehouse, where, by an accidental fire, they were the same night consumed: it was decided, That the keeping them being for the convenience of the owner of the goods, not of the carrier, he was not liable; and that this was an attempt to charge him as a warehouseman, which could not be, as he had been guilty of no neglect.

Dale v. Hall.  
1 Wils. 281.  
Rich v. Kneland.  
Cro. Jac. 330.

But any person carrying goods for hire is a carrier, and chargeable as such for any loss; as waggoners, captains of ships, lightermen, and such like.

But to these are the following exceptions:

Uphate v.  
Aidec.  
Com. Rep. 25.

1. *Hackney-coachmen* are not carriers within the custom of the realm, so as to be chargeable for the loss of goods, unless paid expressly for the purpose; for they undertake but for the carriage of the *person*: and on the same ground *stage-coachmen* are not liable, unless they are paid extra.

Lane v. Cotton.  
1 Salk. 17.

2. The *postmasters-general* are not liable for losses of bills or notes of value out of letters put into the post-office, for the post-office is for *intelligence*, not for *insurance*; and it is impossible that the postmasters can be answerable, who are to execute their office in so many, and so very distant places.

Whitfield v. Ld.  
Le Despencer.  
Cowp. 745.

And this was so adjudged, though it appeared that the note in question had been taken out of the letter by a clerk employed in the post-office as a sorter of letters.

Sutton v. Mitchell.  
1 Term Rep.  
11. ante

3. By stat. 7 Geo. 2. c. 15. "The owners of ships are only liable for any loss by reason of embezzlement, secreting, or making away of any gold, silver, or diamonds, or other merchandize of value by the master or mariners, to the value of the ship and freight."

Com. Rep. 134.

3. "The third species of bailment is a delivery by way of pledge, which is called *vadium*: as to which,"

Co. Litt. 89.  
Salk. 523.

1. "If the goods so pawned be stolen, the pawnee shall be discharged, for he had a special property in them himself, and therefore is bound to keep them no otherwise  
"than

"than as his own; and he shall therefore still recover the  
"money for which the pawn was given."

But if the *pawner tenders the money*, and the *pawnee refuses it, and keeps the goods*, if they are afterwards lost, the pawnee is chargeable; for after the tender, the goods cease to be a pledge, and the pawner may have trover for them. Manby v. West-  
brook.  
29 G. 2. K. B.  
Bull. N. P. 72.

2. If the pawn be of somewhat which is not the worse for wearing, as jewels or such like, the pawnee may use them, but then it is at his peril, for if lost so, he stands at the loss; but it is otherwise if the pawn has been locked up, and not used: but if the pawn be of such a nature, that the keeping is a charge to the pawnee (as if it be a cow or a horse) the pawnee may milk the cow or ride the horse, and this in recompense of the keeping. Anon.  
2 Salk. 522.

4. "A fourth species of bailment is the delivery of goods for hire; as hiring out an horse, which is called *locatio* or *conductio*; and here the hirer is to take all imaginable care, and if, notwithstanding, the thing be lost, he is not liable." Com. Rep. 134.

5. "A fifth species of bailment is a delivery of goods for some purpose (as to merchandize) without any reward: it is called an *adting by commission*, and though the bailee is to have nothing for his trouble, yet if there was any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods are lost without any default in him, he is not chargeable; for his having taken reasonable care shall discharge him."

As where the plaintiff had so bailed goods to the defendant, to merchandize for him, which were lost, and on an action brought, the defendant pleaded *that he had lodged them safely in a warehouse at Porto Bello, from whence they had been taken by the enemy*, and demurrer for cause, that by putting them out of his possession he had *not taken due care* of them; but *per cur.* If the warehouse was not a place of safety, the plaintiff should have replied so, for a special bailee is not to carry the goods about with him; and if he lodges them in a place of security, he shall not be charged in case of a loss. Goswell v.  
Dunckerley.  
1 Stra. 681.

6. "The last species of bailment is a delivery of goods, from the keeping of which some profit arises to the bailee; as oxen to plough with, which are to be returned in specie; this is called an accommodation, a lending *gratis*: in this case, the borrower is bound strictly to keep the thing so lent, for if he be guilty of the least neglect, he shall be answerable," Com. Rep. 134.

Co. Litt. 37. a. "answerable, though he shall not be charged where he is in  
"no fault."

Com. Rep. 136. But in this case the bailee *must use the thing lent in the manner intended*; as if a man lends another an horse to go into the west, and he goes into the north, and the horse dies, the bailee is chargeable; but if the horse be stolen out of the stable without any fault of the bailee, no action lies; but otherwise, if he leaves the door negligently, and the horse is stolen.

Ibid.

Under this head of bailment seems to fall the action against *innkeepers*, for they are chargeable with any losses happening in their inns by reason of the profit, arising either from the keeping of the horses, &c. of their guests, or from the profits from the guests themselves.

As to whom it has been resolved,

Calye's case.  
8 Co. 32.  
Cro. Jac. 224.

1. The person chargeable as an innkeeper must be the *keeper of a common inn*, for such only are chargeable for the loss of the goods of the guests whom they entertain.

Mafen v.  
Grafton.  
Hob. 245.

It was moved in this case in arrest of judgment, that the plaintiff, in his declaration against the defendant, who was an innkeeper, had set out the house only as *hospitium*, not as *commune hospitium*; but it was over-ruled, for *hospitium* meant a common inn; it would be *domus*, not *hospitium*, if it was not *commune*.

Calye's case.  
Ibid.

2. It must appear that the person robbed in the inn was a *traveller and guest*; for if a neighbour comes to an innkeeper, and desires a lodging, such person is not a guest to recover against the innkeeper.

3. "So he *must be received* as a guest by the innkeeper, in order to make him chargeable."

Bird v. Bird.  
1 And. 29.  
Anon.  
Moor 78.

For if a traveller comes to an inn, and the innkeeper tells him his house is full, and the traveller replies, that he will shift or take his chance in the inn, which the innkeeper suffers him to do, and the traveller is robbed, the innkeeper is not liable; but if the traveller had not used these words, and the innkeeper notwithstanding his first objection had admitted him, he had been chargeable; for in the first case, the traveller takes all risk of loss upon himself, and the innkeeper refuses to take charge; but in the latter case, the admission is an implied waiver of the first denial, and so restores the right of charging him.

4. "The loss to the guest must be occasioned by the act of *the innkeeper, or some of his servants, or through their neglect*."

Therefore,



Therefore, if the guest is robbed *by his own servant or companion*, the innkeeper is not liable, because it was the guest's fault to have such persons with him; but if the innkeeper appoints another person to sleep in the room with his guest, and he is robbed, the innkeeper is liable. Calye's case. 8 Co. 22.

5. The innkeeper is only answerable for such goods of his guests *as are within his house*, and so are under his care: and therefore if a guest at an inn orders his horse to be turned out to graze, and the horse is stolen, the innkeeper is not liable; but if the innkeeper had turned the horse to graze, out of his own head, he had been liable, for it was his own act, and the horse entirely in his own care. S. C. Ibid.

And even while the things are in the inn, if the innkeeper directs the guest *to place his goods in a particular place, under lock and key or he will not be answerable for them*, and the guest refuses or neglects to do so, but puts them in another place, and they are lost, the innkeeper in that case is not chargeable. Brand v Glaf. Moor 158. Dyer 206.

But without such particular direction from the innkeeper, if the goods are lost, it will be no excuse to say that he delivered the key of the chamber to the guest, and that he did not acquaint the innkeeper what the goods were; or that the thief is discovered. Calye's case. Ibid.

6. "As the innkeeper is chargeable on the ground of the profit he derives from his guest or his goods, *where there is no profit to the innkeeper, there shall be no charge.*"

Therefore if a guest comes to an inn, and departs leaving his goods there, and tells the innkeeper that he will return in a few days, and during his absence the goods are lost, the innkeeper shall not be charged; for he has no profit or gain from the keeping of such dead goods, and therefore shall not be chargeable for their loss. Gelley v. Clark. Cro. Jac. 188. Noy. S. C.

But to this are these exceptions:

1. It must not be a temporary absence; as if the guest goes out in the morning about business, and returns before night, this is not such an absence as shall excuse the innkeeper. Sir Edwin Sandy's case. Cro. Jac. 189.

2. This is confined to the case of *dead goods*; for if the guest leaves his horse there for any time, though he is not there himself, the innkeeper shall be charged in case of a loss; for the standing of the horse is a profit to the innkeeper, and in respect of that he is chargeable. York v. Grindstone. Salk. 388.

Croft v.  
Andrews.  
Cro. Eliz. 622.

7. It was adjudged in this case, That where to an action against an innkeeper for goods lost in his inn, he pleaded, that at the time that the plaintiff lodged in his inn, *he was sick and of non-sane memory*: on demurrer to this plea, it was held, That if a man keeps an inn, he ought at his peril to take care of the goods of his guests, and if he be sick, that his servants ought; and that it lieth not for him to say that he was of non-sane memory to disable himself in this action, no more than in debt on an obligation.

Caley's case.  
8 Co. ante.

8. The writ against innkeepers, mentions only *bona et catalla*, which properly does not comprehend deeds or writings, which are only *chores in action*; yet by reason of the words in the writ, "*ita quod hospitibus nullum eveniet damnum*," they are comprized; and for the loss of these the plaintiff may declare specially.

Ibid.

But these words confining the loss to moveables, the innkeeper shall not be liable for any *loss or injury done to the person* of his guest while in the inn; as an assault, battery, or such.

Beedle v.  
Morris.  
Cro. Jac. 224.  
Yelv. 162,  
8. C.

9. If a servant is robbed of his master's property, the master may maintain this action against the innkeeper at whose inn the goods were lost.

Drope v.  
Thayne.  
Nov. 79.  
Poph. 179.

And in such suit by the master, he need not shew that the servant *was on a journey*, for perhaps he was at the end of his journey; as in *London* on his master's business.

Drope v.  
Thayne.  
Latch. 127.

10. If *one joint-tenant of goods* is robbed, both may join in this action.

Anon.  
Keilw. 50.  
Anon.  
Pyer 158. pl. 33.

11. Another case in which an action lies against an innkeeper as such, is *for refusing to entertain a traveller*, and to provide his horse with meat, he tendering him the proper price for the same.

## 2. OF INJURIES TO PERSONAL PROPERTY IN CASES WHERE THERE IS NO TRUST.

The principal injuries under this head, are, 1. For maliciously suing out a commission of bankruptcy: 2. For deceit in sales: 3. For not procuring an insurance: 4. For the malicious use of any power or authority.

### Of Injuries by Maliciously suing out a Commission of Bankruptcy.

Brown v.  
Chapman.  
3 Burr. 1418.

If any person shall *maliciously sue out a commission of bankruptcy against another*, which commission is afterwards superseded, an action on the case lies against such petitioning creditor at the suit of the bankrupt; and this notwithstanding the bond given in pursuance of stat. 5 G. 2. c. 32.

to the chancellor in the penalty of 200*l.* conditioned to prove the bankruptcy, and by him assignable to the bankrupt, for this bond may be inadequate to the damage sustained; and though there is the same remedy under the statute, yet it is a common law-remedy, and the statute being in the affirmative, both stand together.

## 2. Of Injuries from Deceit in Sales.

This respects warranties or frauds in the cases of sales: 1. Where there is some fraud or deceit on the part of the seller: 2. Imposition from cheating, or false pretences.

Fraud or deceit in the seller may be either, 1. In the *value of the thing sold*: 2. In the *seller's title to it*.

1. "Where a thing is of a *certain value*, and *that known to the seller*, but cannot be known to the buyer; for any deceit in the affirming the value to be different from what it is, this action lies."

As where the landlord of an house, wishing to dispose of *Rifacy v. Seiby*, his interest in it, *affirmed the rent to be more than it really was*, <sup>1 Salk. 211.</sup> whereby the purchaser was induced to give more for it than it was worth, this action was held to lie; for the value of the rent was a matter of private knowledge between the landlord and tenant.

"But if the buyer *has it in his power to inform himself of s. c.* *the true value and neglects it*, the action will not lie."

As if the landlord had only said, that *J. S.* would give so much for it, whereas *J. S.* had never offered any thing, the <sup>Lord Raym.</sup> action would not lie, for the buyer might have enquired from *J. S.* and been informed of the truth.

This is the case of things of certain value, but where the things sold are of *uncertain value*; that is, which may depend on whim or fancy, *as pictures, or such things* which may be of more value to one person than to another, there no action will lie, in case of taking an exorbitant price. <sup>Leakins v. Cliffell. 1 Sid. 146.</sup>

2. "From these cases it appears, that a man is chargeable in the case of selling any thing for more than its value, *knowingly*."

"But it also lies for a sale of a thing where the seller is *ignorant of the value*, and that is, where he sells it *with a warranty of its value or quality*." <sup>Harvey v. Young. Yelv. 20.</sup>

As where the plaintiff declared that the defendant, being a goldsmith, and having a skill in precious stones, had a stone which he affirmed to be a *Bezoar-stone*, which he sold to him for 200*l.* *ubi reuera*, it was not a *Bezoar-stone*; the defendant pleaded <sup>Chandler v. Lopus Cro. Jac. 4.</sup>

pleaded not guilty, and the plaintiff had a verdict; but the judgment was afterwards arrested, because that the declaration had not charged either that the defendant sold it *knowing* it not to be a *Bezoar*, or that he had warranted it for such a stone.

3. "If a *servant* sells any thing in the way of his master's business, and warrants it, if there is any fraud or deceit, the master is liable."

*Grammer v. Nixon*  
1 Stra. 653.

As where a goldsmith's apprentice sold an ingot of gold and silver, upon a special warranty that it was of the same value with an assay then shewn, and upon evidence it appeared, That he had forged the assay, and made the ingot out of a lodger's plate that he had stolen; the master was held to be liable.

"And even though the feller himself has been deceived by his servant, yet is he liable to the buyer."

*Hern v. Nichols*.  
1 Salk. 289.

For where a merchant sold silk to another, which afterwards appeared not to be of the kind the purchaser meant to buy, whereby he was imposed upon in the value; he recovered against the merchant the seller, though it appeared that there was no actual deceit in the seller, but that it was in his factor beyond sea; for he should be answerable for the deceit of his factor *civiliter*, though not *criminaliter*: and since somebody must suffer, it was more reasonable that he who trusted the factor should be a loser than the other.

4. "But in order to charge the seller by reason of his warranty, it must be observed,"

1. "That the warranty does not extend to defects visible to the eye of the buyer, for of these he must be apprized at the time of the sale; but if the defect is not visible, there a general warranty shall extend to it, and subject the seller in case of a fraud."

*Finch's Law*,  
289.

As on a warranty on the sale of cloth that it is of such a length, and it turns out to be otherwise, this action lies against the seller; because such a defect is not visible to the eye, but is to be discovered only by measuring.

*Butterfield v. Burroughs*.  
Salk. 24.

But where the warranty was on the sale of an horse, which was warranted sound by the seller, and it appeared afterwards that he was blind, this action was held to lie; for though blindness is a defect in general visible to the eye, yet in horses it requires skill to discern it.

*Finch's Law*,  
289.

2. "The warranty must be made at the time of the sale and not after it, in order to charge the vendor; for it  
"made

"made after the sale, it is made without consideration: neither does the buyer *then* take the goods on the credit of the seller."

"So the warranty should be in the present tense, that the thing *is found*, not that it *will be found*." 3 Black. Comm. 159.

"And where there is an express warranty, the warrantor undertakes that it is true at the time of making it, and no length of time elapsed after the sale will alter the nature of a contract originally false; and if it be false and fraudulent on the part of the seller, he will be liable to the buyer in damages without either a *return* of the thing or *notice*." Per Lord Loughborough. H. Black. Rep. 19.

For where in an action on the warranty of a mare, sold by the defendant to the plaintiff, it was proved, That in *March* 1787, the defendant sold the mare to the plaintiff, and warranted her *sound and free from blemish and vice*: soon after the sale, the plaintiff discovered that she was unsound and vicious; he however kept her for three months, and endeavoured to cure her: at the end of three months he sold her, but she was returned as unsound. After she was so returned, the plaintiff kept her till the month of *October*, when he returned her to the defendant, who refused to receive her: on her way back to the plaintiff's stable she died; and it was the opinion of farriers that *she had been unsound a twelvemonth before*; it also appeared that the plaintiff and the defendant had been often together, during the period he had had her, but it did not appear that the plaintiff had ever acquainted the defendant with the circumstance of her being unsound: the jury found a verdict for the plaintiff; and on a motion for a new trial, the court held the above doctrine, and refused it. Fielder v. Stark- in. H. Black. Rep. 17.

3. "An offer of a warranty *at one time*, shall not extend to a *subsequent sale* of the same thing."

For where the defendant came to the plaintiff, who was a sword-cutler, and offered to sell him a second-hand sword, and warranting the hilt to be silver; the plaintiff offered him a guinea and a half for it, which the defendant then refused; but having offered his sword to many sword-cutlers, and none bidding him so much money as a guinea and a half, he returned to the plaintiff, who then would give him but twenty-eight shillings, which the defendant took: it appeared afterwards that the gripe only was silver, and the rest brass; upon which the plaintiff brought his action on the *first warranty*, when the court were of opinion, *That it did not extend to the subsequent sale*; and the plaintiff was non-suited. Anon. 1 Stra. 414.

Southern v.  
Howe.  
x Roll. Rep. 5.

4. If the vendor, knowing the goods to be unframed, *uses any art to disguise them*: or if they are in any shape different from what he represents them to be to the buyer, this action lies; for this artifice shall be deemed equivalent to an express warranty.

2. "The second species of fraud in the seller on which this action is founded, is where there is a fraud in the representation he makes of *his title* to the thing sold."

Harding v.  
Freeman.  
Style 311.

As where the plaintiff declared that the defendant, affirming a certain horse to be his own, and that he had bred him, sold him to the plaintiff; whereas in fact *he had never bred him, and he was the property of J. S.* the plaintiff recovered notwithstanding there was no express warranty or averment that the defendant knew that the horse belonged to J. S.

Furnis v. Leicester.  
Cro Jac. 474.  
Croft v. Gardiner, 8. P.  
Show. 63.

And the buyer may maintain this action against the seller, who so sells without any title the goods of another, *though he has never sustained any damage, or the true owner has not retaken them, or sued him for them*; for the sale under these circumstances is itself an offence; and if he should wait till the goods were retaken, he might be remediless, and sustain a mischief.

Medina v.  
Stoughton.  
Salk. 210.  
L. Raym. 593.  
S. C.

2. The gift of the action therefore is the sale, the seller knowing the goods not to be his own property; for the declaration must be, that he did it *fraudulently, or knowing them not to be his own*: it is therefore incumbent on the plaintiff to prove that fact, that the *defendant knew the things sold not to be his own* at the time of the sale; for if the defendant had a reasonable ground to believe them to be his property (as if he bought them *bona fide*) no action will lie against him; but the defendant cannot plead such matter, he must give it in evidence.

Warner v. Tal-  
lerd. quot.  
9 Danv. 176.  
pl. 7.

3. Of the same nature with this fraud is where a person affirming that certain goods are the property of his friend, and that *he has authority to sell them*, in fact sells them, he having no such authority; in which case this action lies for the deceit.

Bull. N. P. 30.

In this case the deceit being in the false affirmation, it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so (for it need not be averred in the declaration); and this proof would be sufficient to put the defendant upon proof that he had authority to sell them.

Medina v.  
Stoughton.  
Salk. 218.  
2 Ref.

But in both cases, if the seller is *out of possession* of the thing sold at the time of the sale, no action will lie against him,

him, though the thing sold was not his own, unless there was an express warranty; for being out of possession, there was room to question his title, and in such cases it is *caveat emptor*.

As where the defendant affirming that he was incumbent of the living of *Stoke*, sold the tithes to the plaintiff, when in fact he was not incumbent, and had no title, the action was held not to lie on the ground above-mentioned, he not being in possession. *Roswell v. Vaughan*. Cro. Jac. 196.

2. The second ground of this action, as founded on deceit, is where an injury is done to any person from an imposition in cheating or using false pretences.

As where money was left in the hands of a third person to be delivered to the plaintiff, and the defendant pretending to such person that he was the plaintiff, obtained the money; this action was adjudged to lie against him. *Thompson v. Gardner*, Moor. 583.

“ So for cheating a person with false cards or dice of any sum of money, this action will lie. *Harris v. Bowden*. Cro. Eliz. 90.

But it was decided in this case, That where a person, affirming himself to be of full age, had obtained several sums of money, whereas in fact he was under age, and so not liable to the money borrowed, that the action did not lie; for being an infant, his contracts were all void. *Johnson v. Pye*. 1 Sid. 258.

So assuming a false character, and by that means committing a cheat is actionable: as if a man, pretending to be single, prevails on a woman to marry him, when in fact he is married, this action will lie. *Sed quare*, this being felony. *Skinn.* 119. *Garford v. Richardson*. Trin. 36 Car. 2. Bull. N. P. 32.

But if a woman who is married commits a similar fraud, no action will lie; for all acts of a *feme covert* are void. *Cooper v. Whetham*. 1 Lev. 247.

3. A third case of injury to personal property for which this action lies, is

### For not Procuring an Insurance.

For where a merchant gives instruction to his correspondent to effect an insurance on a ship of his, and he neglects to do it, *case* lies under the following circumstances: 1st, When the merchant abroad has effects in the hands of his correspondent in *England*, he is bound to insure, if ordered so to do; for the merchant abroad has a right to appropriate his money in the hands of another in the manner he thinks proper: 2dly, When there are no effects of the merchant abroad in the hands of the other, but the course of dealing

*Smith v. Laffcelles*. 2 Term Rep. 187.

ing has been such, that the one has been used to send orders for insurance, and the other to comply; in such case, if the merchant here neglects to make an insurance, he shall be liable, unless he has given notice to discontinue such dealing: 3dly, Where the merchant abroad has sent bills of lading to his correspondent in *England*, he may engraft on them an order to insure, as the implied condition on which they are to be accepted, which the merchant here must obey if he accepts them.

Wallace v. Tell-  
fair, Sitt. Guild-  
hall, 1786,  
coram Buller,  
Just. 2 Term  
Rep. *ibid*.

But if the merchant abroad limits the merchant in *England* to too small a premium, so that no insurance can be procured, the merchant here shall not be liable.

Smith v. Cado-  
gan, *ibid*.

So where the merchant here uses due diligence to procure an insurance, which cannot be done (as here, because the ship was not registered at *Lloyd's coffee-house*) and he afterwards, by other means, gets an insurance, which turns out ineffectual, but without his fault; as where it was sent to a house at *Newcastle*, which house fraudulently kept the policy, the merchant here was held to be discharged.

Per Ld. Mans-  
field.  
Cowp. 480.

“ For to maintain this action, the defendant must be guilty of a breach of orders, gross negligence, or fraud; and to these matters the attention of the jury is to be directed, who, if they find that the defendant was guilty of none of these, the court will give judgment for him.”

Moore v. Mor-  
gue.  
Cowp. 479.

Therefore where the plaintiff, who was a merchant in *Alicant*, sent instructions to the defendant who was his agent in *London*, to insure a cargo of fruit; the instructions were general, nothing as to insurance in any particular place or manner; the defendant insured the cargo at the *London Assurance-office*, at which office, in policies upon fruit, there is an exception of being “free from particular average;” the policy was made with this exception: a loss happened, but it was only a partial one, so that the plaintiff had no benefit from the policy, and he brought this action for neglect in effecting the insurance; but it not appearing that he had been guilty of any gross neglect, or of any *mala fides*, he deriving no advantage from the insurance made in that way, more than in any other, the jury found for him; and on a motion for a new trial, the court confirmed the verdict.



#### 4. Of Injuries arising from the malicious Use of any lawful Power or Authority to the Oppression of another, and the Injury of his Property.

As where this action was brought against the defendant, Sutherland v. who was governor and vice-admiral of *Minorca*, by the plaintiff who was judge of the vice-admiralty court, "for maliciously, and without probable cause, suspending him from his office, *per quod* he lost the profits and emoluments of the same:" it appeared that the defendant had legal authority to suspend, till the king's pleasure was known: that he had professed himself ready to restore the plaintiff on his making a particular apology; and the king approved of the suspension unless the terms were complied with; notwithstanding which, the plaintiff recovered 5000*l.* damages, on the ground That the suspension was malicious, and had been confirmed, by means of the defendant's false and malicious representations at home. Murray, quot. 1 Term Rep. 538.

But where the action was by the plaintiff Captain *Sutton*, Sutton v. for suspending him from his command of his ship, and carrying him about with the fleet as a prisoner, until he was tried by a court-martial, when he was acquitted; against the defendant who was commodore and commanded it, the action was held not to lie; as being of dangerous consequence to the disciplining of the navy, to permit such actions to be brought against the commander, and particularly as he was subject himself to suspension and dismissal from the service for any cruelty or oppression to his officers: and that therefore the only redress was by a court-martial. Johnstone. 1 Term Rep. 493.

### 3. OF INJURIES TO REAL PROPERTY.

Injuries to real property fall under the two heads of, 1. *Nuisance*: 2. *Disturbance*; the first respecting corporeal, the latter incorporeal hereditaments.

#### I. OF NUISANCE.

Nuisance is either to the house or to the land.

##### 1. Of Nuisance to the House.

1. "If a man has an ancient house, and another builds so near to him that he deprives him of the benefit of light and air, by darkening his windows, this action lies against the wrong-doer." 9 Co. 58.

"But

**Bury v. Pope.**  
**Cro. Eliz. 218.**

“ But to maintain this action, it is said that the house must be an *ancient house*; that is, have stood there time immemorial; for if two men have land adjoining, and one builds a house on his own land, and makes his windows look into his neighbour's land, though his house may have stood thirty or forty years, yet may his neighbour build an house on his own land, and obstruct the other's lights; for *cujus est solum ejus est usque ad cælum*, and it was folly in the first person to build so near the land of another.”

**Lewis v. Price.**  
**Worcester Sum.**  
**Ass. 1761. MSS.**

But, however, in an action for stopping and obstructing the plaintiff's lights, Justice *Wilmot* said, That where *as house has been built forty years, and has had lights at the end of it*, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption, that there was originally some agreement between the parties: and he said, that as twenty years was sufficient to give a title in ejectment, on which he might recover the house itself, he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

**Palmer v.**  
**Fletcher.**  
**1 Lev. 122.**

2. But if a man builds an house upon any part of his own land, and afterwards sells that house to another, neither the vendor nor any person claiming under him shall be allowed by any erection to stop the lights; for no man shall be allowed to do an injury in derogation of his own grant.

**9 Co. 58. b.**

3. But where a man has such ancient messuage, and so prescribes to have his lights uninterrupted, no contrary prescription to stop the lights shall be alledged against it; for each being supposed to have existed from time immemorial, the latter cannot be deemed more ancient than the former.

4. “ It should seem, that where a man builds his house *near a street*, he is entitled to all the privileges of an ancient messuage.”

**Lewler v.**  
**Moxon & al.**  
**3 Will. 461.**  
**2 Black. Rep.**  
**924. S. C.**

For this action was adjudged to lie against the commissioners for paving, for raising the street so high as to obstruct the plaintiff's lights and windows; for the ground of the street being appropriated to the public, excludes the idea of folly in building near the ground of another, and close to the street is the most proper situation.

**9 Co. 58.**

5. But raising a wall to obstruct a *prospect*, or in anywise to prevent it, is not actionable, for it only deprives the party of a *matter of pleasure*, and abridges him of nothing either useful or necessary.

6. A re-

6. A recovery of damages in this action does not discharge the nuisance; *for every continuance of it* subjects the offender to a new action, and therefore a person may recover damages for a nuisance to an house which commenced before he came into possession, if it existed when he entered.

Westborn v. Mordaunt. Cro. Eliz. 191.  
2 Leon. 103.  
S. C.

Therefore where the plaintiff recovered damages against the defendant for a nuisance to his house, and the defendant afterwards under-let it, and this action was for a continuance of the nuisance *after the under-lease*, it was held well to lie; for as he was before liable to an action for the continuance, he should not discharge himself by his own act of under-letting; and as he had a rent in consideration of the continuance of the nuisance, he ought to answer for the damages it occasioned.

Roswell v. Prior. Salk. 460.

So also may an action be maintained *against the assignee* for a continuance of the nuisance; but with this distinction, that where the whole mischief has been done to the plaintiff by the first erection, there the action will not lie against the assignee; but where the continuance occasions a new nuisance, the assignee is liable.

Rippon v. Bowles. Cro. Jac. 473.

7. This action may be maintained by the *lessee for years*, for obstructing the lights of an ancient messuage, grounded on the *prescription*, notwithstanding the weakness of his estate; for the prescription is to the house, not to the person.

Symonds v. Seybourne. Cro. Car. 325.

So also may he in *reversion* as well as he in possession maintain an action for a nuisance, by obstructing the lights; for it is an injury to the *inheritance* as well as to the present enjoyment; and each may have his own action.

Jeffar v. Giffard. 4 Burr. 2141.

2. A second species of nuisance to the house consists in *over-banging it*, or building so near to the house of another that the water falls off his roof on that of his neighbour, and thereby injures and rots it.

Of the same nature also was the case of putting up a spout, which conveyed the water into the premises of the adjoining neighbour: this was a nuisance, and actionable.

Reynolds v. Clark. 1 Stra 634.

3. A third species of nuisance to the house, is by *infesting it with bad and noisome smells*, so as to make it unwholesome to reside in; but this falls under the first head of Injuries to the Person.

Wm. Aldred's case. 9 Co. 57. a.

## 2. Of Nuisance to the Land.

1 Roll. Ab. 89. 1. "If any person erects a smelting-house, or works for  
 Rex v. White. "making *aquafortis*, or such like, the *vapour and smoke of*  
 1 Burr. "which *spoils the grass or corn, or injures the cattle of his*  
 "neighbour, it is a nuisance to the land, for which this ac-  
 "tion lies."

Westbrow v. 2. If a person *suffers the ditch adjoining to his neighbour's*  
 Mordaunt. *land to become foul*, or throws stones or rubbish into it, which  
 Cro. Eliz. 191. causes it to overflow, and so injures the land, this action will  
 lie for the injury.

Brown v. Best. 3. So, if a person who has a *right to a stream of water*  
 2 Will. 174. *running to his land, or mill*, and another person turns it; or if  
 that person, having a right to the use of it in a certain pro-  
 portion, *varies from that proportion*, trespasses on the case will  
 lie against him. As in this case, where the defendant pre-  
 scribed to have water from a certain water-course, running  
 through the plaintiff's ground, to two pits on his ground, for  
 watering his cattle, it was adjudged that an action lay for  
 deepening and widening those pits.

Luttrell's case. But where a man has by prescription a right to a stream of  
 4 Co. 84. water, he may *vary the uses* to which it is applied; as where  
 formerly there were fulling-mills, he may alter them to corn-  
 mills, if he does not alter the quantity of the water.

Bowlston v. 4. Another injury to the land is, If a man *suffers such a*  
 Hardy. *number of conies on his land that they go in on that of his neigh-*  
 Cro. Eliz. 547. *bour, and spoil it*, and yet for this no action will lie, for they  
 5 Co. 104. are animals *feræ naturæ*, in which he has no property. *Vid.*  
 3. C. *post.*

Some v. Note, That where a nuisance is done to the land of two  
 Barwist. tenants in common, they shall join in this action; for it is  
 Cro. Jac. 231. personal, and concerns the profits of the land.

5. Another injury to the land for which this action is main-  
 tainable is, *for not keeping the fences in repair*, by which a  
 party is injured.

Cheestham v. And such action must be brought against the *occupier of the*  
 Hampson. *land*, and will not lie against the owner of the inheritance,  
 4 Term Rep. who is not himself in possession; for the landlord cannot be  
 318. deemed a wrong-doer for the neglect of his tenant.

6. "Another injury to the land for which this action lies,  
 "is *against a parson or impropriator for not taking away his*  
 "tithes, which by lying on the grass, rot and destroy it."

But,

But, 1. "A parson or impropriator is not obliged to take away the tithes *till they are all set out*: So that no action will lie till then, except there is a custom to the contrary."

For where the action was brought for not taking away of tithes *by degrees* as cut, the tithes being so set out, grounded on a custom so to take them, it was resolved, 1. That it was not sufficient to establish this mode of tithing, that the former parson, fifty years ago, had so taken the tithes: 2. Nor that such mode *was the custom of adjoining parishes*; though it had been otherwise if it had been the custom of the whole county.

Furneaux v. Hutchins.  
Cowp. 807.

2. "Where the tithes are set out, no notice by the common law is necessary; but it is required by the ecclesiastical law: And this notice is often required by custom; in which case it is good."

3 Burr. 1892.

For where this action was brought against the plaintiff, who was impropriator of tithes, for not fetching away the tithes within a reasonable time after being set out, the defendant relied on the custom of the parish, that notice should be given to the owner of the tithes, of the setting of them out, which in this case had not been done: the custom was held to be a good and reasonable one; and the defendant had judgment.

Butler v. Heathby.  
3 Burr. 1891.

These are the most material cases falling under the head of Nuisance. I shall now consider injuries to incorporeal hereditaments under this head,

## 2. OF DISTURBANCE.

### 1. Of Disturbance of Ways.

1. "If a person has a right to a private way over the land of another, and that way is obstructed or shut up, the person having such right may maintain for such obstruction an action on the case."

Cantrell v. Church.  
Cro. Eliz. 84.  
ib. 466.  
S. P.

2. This right of way arises, 1. From the grant of the owner of the soil: 2. From prescription, which supposes an original grant: 3. From operation of law; as where a man plants a piece of ground in the middle of his field, he tacitly gives a right of way to it, as necessary to its enjoyment.

Finch's Law,  
63.  
Co. Litt. 56.

So where a man having four closes, sold three of them, and reserved the middle one, without any saving of a way to it, and there was none but over the closes he had sold; it was resolved,

Clark v. Cogg.  
Gro. Jac. 170.

T t

resolved,

resolved, That the law reserved to him a right of way to it, over those he had sold.

As to the first: "Constant and uninterrupted usage of a way, though not going the length of prescription, shall carry such a presumption of a grant, as to give a good and valid way over the lands of another."

*Keymer v. Summers*,  
Hereford  
Summer  
Assizes 1769.  
Buller N. P.  
74.

For where in an action for obstructing a way, the plaintiff proved, that one *Fowler* was seised both of plaintiff's tenement and of the defendant's close; and in 1753 had conveyed to the plaintiff the tenement, with all ways therewith used; and that this way had gone with the tenement as far back as memory could go: the defendant produced a subsisting lease for three lives from *Fowler*, made in 1723, by which he demised the field in question in as ample a manner as one *Roch*, a former tenant had had it; and in this lease there was no exception of a way over the close. Just. *Yates* held, That by the lease without the reservation of way, that it was good and so could not pass under the words *all ways* in the conveyance. But as the defendant's lease had by 30 years preceded the plaintiff's conveyance, and the way had been used all the time, that was sufficient to afford a presumption of a grant of licence from the defendant, so as to make it a way lawfully used at the time of the conveyance, and then the words of reference would operate on it, and the way pass.

As to the second: "But where a way is claimed by prescription, if a grant of it appears, the prescription is not necessarily at an end, and mere usage after, gives no right."

*Rex v. Hadfon.*  
2 Stra. 909.

For where in case for stopping a way, the plaintiff proved it to have been a way as far back as witnesses could remember; but defendant producing a lease made of this way for 56 years, that it might be a passage during that time, which term had expired *A. D.* 1728, some years before this action was brought; the Chief Justice held, That the leaving the way open for a few years after the term ended, was not sufficient to make it a gift to the public.

*Starry v. Pigot.*  
1 Atch. 153.  
Poph. 172.

"But though a person may have a good right of way, yet that shall be destroyed by unity of possession, unless it is a necessary one, and then it shall not."

11 H. 5. 4.  
Year book.  
21 E. 3. 2.  
2 Shep. Ab.  
156.

As if *A.* seised of *Blackacre*, and *C.* of *Whiteacre*, and *A.* has a right of way over *Whiteacre* to *Blackacre*, and *A.* afterwards purchases *Whiteacre*, the right of way is extinct: as

if *A.* afterwards enfeoffs another person of *Whiteacre*, the severing of the possession does not restore the right of way, if no reservation nor grant is made of it; for a right of way lying in grant, and being once extinct, by grant only can it be revived.

2. A second species of disturbance for which this action lies, is for a disturbance of the right of *common*.

But, 1. The ground of this action, as far as respects the commoner is, that he is deprived of his common, so that he cannot enjoy it in so ample a manner as he is entitled; and therefore if *the trespass be so small, that the commoner has not any or a trivial loss*, this action will not lie for him; but the lord may have trespass immediately for any injury.

2. The commoner has no property in the soil, for that still remains in the lord, who may exercise any act of ownership which does not detract from the commoner's right of common: As he may put conies on the common, and the commoner cannot destroy them, or fill up their burrows.

But if they increase so fast, and in such numbers as to destroy the common, the commoner can have this action against the lord, on the ground that he cannot enjoy his common in so ample a manner, &c.

3. Turning an ancient *watercourse* is another injury for which this action lies.

4. A third species of disturbance is, that to the right of holding *fairs* or *markets*.

If any person is entitled to hold a fair or market, and another person sets up another fair or market so near to the former as to prejudice its custom, this action lies for the injury.

1. "But to support this action, it must appear that the plaintiff's fair or market was the elder one, for otherwise he is himself the wrong-doer."

2. It is sufficient to make it a disturbance, that the second fair or market is erected *within seven miles* of the former; that is, one third part of a day's journey, reckoned at 20 miles; for so the day being divided into three parts, he has one third to go, one third to return, and one third for his business.

3. "So if the second fair or market is held *on the same day with the former*, it is a disturbance; and even if held on a different day it may be a disturbance."

Yard v. Ford.  
2 Saund. 173.  
1 Lev. 296.  
8. C.

As where the plaintiff declared generally that he was seized of a market, and that the defendant had erected another, without any lawful warrant, within seven miles of his market. Exception was taken in arrest of judgment, that the plaintiff had not said that it was on the same day; but it was over-ruled, particularly it being after a verdict.

#### 4. A fourth species of disturbance is,

Coryton v.  
Lithebye.  
2 Saund. 115.

If a man is entitled by prescription to have all the corn of the tenants of a certain manor ground at his mill, this action lies against any of the tenants who carries his corn elsewhere to be ground.

Cort v. Birbeck.  
Doug. 238.

And a custom, "That all the inhabitants, tenants, and resiants within the manor, shall grind all their corn, grain, and malt, which by them or any of them should be used or spent, ground within the manor, and ground at the plaintiff's mill, and not elsewhere," is a good and legal custom: and a bill filed in the Exchequer, wherein the occupier of the mill was plaintiff, and some of the inhabitants, resiant within the manor, were defendants, in which an issue was directed to try the custom, is good evidence in an action on the case.

Blissett v. Hart  
Mich. 18 G. 2.  
B. R.  
Bull. N. P. 76.

5. A fifth species of disturbance for which this action lies: If a man has an ancient ferry, and another sets up a new ferry near it, the owner of the first ferry may have his action for the injury, in drawing away his custom.

2 Roll Ab. 140.

For he who has an ancient ferry is compellable by law to find boats safe and fit for the purpose; and if he does not, he may be amerced: And as the law therefore imposes such a burden on him, it will protect him in the exclusive and uninterrupted enjoyment of such right. And therefore where the law has imposed no such obligation, it gives no such exclusive right.

1 Roll Ab. 107.  
Hale on  
F. N. B. 184.

As if a man sets up a new mill or school in the neighbourhood of an ancient one, an action will not lie, though a damage may from thence accrue to the former mill or school; for such rivalryship is of public benefit and advantage, and it is *damnum absq. injuria*.

"But where a ferry is claimed by prescription, the owner shall only have his actions for *direct injuries to his rights*."

Tripp v. Frank,  
4 Term Rep. 666.

For where the plaintiff claimed as lessee of the ferry from Kingston upon Hull to Barton, and brought his action for a incroachment on his right; it was proved that the defendant



who was owner of a market-boat belonging to *Barrow*, a place two miles lower down the river than *Barton*, had at different times ferried over persons to *Barton*; that there was a daily ferry between *Kingston* and *Barton*, but that the ferryman was not obliged to provide boats to any place but *Barton*; it was adjudged, That the action would not lie, for the prescription went only to carry persons over to *Barton*, and could not be extended to the carrying persons to a different place, unless that was done colourably and fraudulently to prevent the use of the regular ferry, as by landing the passengers within a short distance of the regular ferry.

6. "Another species of disturbance for which this action is given is, if a person having a right to sit in a particular pew in a church, is disturbed therein, his remedy is by action of trespass on the case."

This right to sit in a particular pew of a church arises either from prescription, as appurtenant to a messuage from keeping it in repair, or from a faculty from the ordinary; for in him is the disposition of all the pews, except those claimed by prescription. Gibb. Codex. 221.

As therefore the disposition of the pews is *prima facie* in the ordinary, in case of any disturbance in the enjoyment of the pew, the plaintiff must make out his title either against the ordinary or against a wrong-doer, by shewing his title by prescription to the pew, as appurtenant to a messuage, or under a faculty from the ordinary. Stocks v. Booth. 1 Term Rep. 428.

But there seems this difference; that where the action is against a stranger for a disturbance, the plaintiff need not state nor prove repairs, it is sufficient to lay his title generally, as appurtenant to a messuage. But where the action is against the ordinary, he should shew both prescription as appurtenant to a messuage and repairs; for in this case the plaintiff declared on his right to the pew, as appurtenant to an ancient messuage, and that he, &c. had used to repair it, but no repairs were proved; and the first was held to be sufficient, the defendant being a stranger. Kenrick v. Taylor. 1 Will. 326.

But an uninterrupted possession for sixty years will not give a title, if neither a faculty or prescription appears. Stocks v. Booth, ante.

It seemed in this case, that the declaration ought to state repairs; but that the want of it would be cured by a verdict. Buxton v. Bateman. 1 Lev. 71. 1 Sid. 201.

7. The last species of disturbance which I shall consider, is that of *Offices*.

Earl of Montague v. Lord Preston.  
2 Vent. 171.

1. If any person has a title to any office, from whence fees or profits are derived, and he is disturbed in that office, he shall have an action on the case for such disturbance.

Harvey v. Newlyn.  
Cro. Eliz. 859.

But the plaintiff in such action must shew that it was an office in fee, and had fees annexed to it: for if an office is not of that nature, there is no injury; and so no action will lie.

Whitchurch v. Paget.  
1 Sid. 74.

2. The principals of the several offices belonging to the courts, have not a power of turning out their clerks at pleasure, unless in cases of misbehaviour or misconduct: and in this case an action on the case was adjudged to lie against the defendant, who was *custos breviarum*, at the suit of the plaintiff, who was one of the under-clerks, and turned out of his employment by the defendant his principal, without any sufficient reason or fault.

#### 4. INJURIES TO PERSONAL RIGHTS, NOT PROPERLY REDUCIBLE TO ANY OF THE FOREGOING HEADS.

These injuries may be divided into, 1. Such as affect a man standing in some relation to others: 2. Where there is no relation.

Injuries affecting a man as standing in some relation to others, may be divided into such as affect him in the several relations, 1. Of an husband: 2. Of a father: 3. Of a master.

#### 1. Of Injuries affecting a Man in the Relation of an Husband.

1. "If any person entices away *the wife of another to live apart from him, without sufficient cause*, the husband may have this action for the injury."

Winifmore v. Greenbank.  
Mich. 19 G. 2.  
C. B.  
Bull. N. P. 78.

As where the plaintiff declared that his wife, unlawfully and without his consent, had departed from him and lived apart, during which time a considerable real and personal estate had been devised to her, to her sole and separate use, and that thereupon she was desirous of returning, and again cohabiting with him, but that the defendant enticed her, and persuaded her to continue absent; by which means she continued absent till her death, whereby he lost the comfort and society of his wife, and the advantage he ought to have had from such a real and personal estate: after a verdict for the plaintiff, and 3000*l.* damages, it was moved in arrest of judgment, that this was an action *primæ impressionis*; but the court said that every action on the

the case was in itself a novelty: No action lies without damages, and the *per quod* will not be alone sufficient, except the act done be unlawful: but though a bare enticement will not be sufficient nor actionable, yet the jury, under the direction of the judge, are judges of the legality. And as receiving the servant of another *scienter* is a ground for an action, *a fortiori* it is so in the case of an husband: and injuries that are within the nature of spiritual cognizance, if attended with temporal damages, are actionable.

2. If in consequence of an enormous battery of his wife, Grey v. Livesey. or any other bodily injury done to her, the husband is deprived of her society and assistance, he may have a particular action for the injury, and declare for a *per quod servitium amisit*, Cro. Jac. 501.

And the ground of the action being the loss of the wife's company, not the injury to the wife herself, she need not join in the action. Hyde v. Scyflor. Cro. Jac. 538.

## 2. Of Injuries to a Man as standing in the Relation of a Father.

1. An action will lie at the suit of the father for getting his daughter with child. Tullidge v. Wade, 3 Will. 18.

But the daughter should be at the time resident in her father's house, or the action will not lie. In this case Lord Mansfield held, That she should be under the age of 21 years; but in the case of *Tullidge v. Wade*, it was held to be no objection, the daughter being above that age. Postlethwayte v. Parks. 3 Burr. 1872.

And the point was expressly decided in this case, that the action lay though she was above 21 years, and that no contract of hiring need be proved, if she in any way appeared to have acted as a servant, Bennet v. Allcott, 2 Term Rep. 166.

But note, This offence is properly sued, not in this action, but in trespass *vi & armis*, the father considering the daughter as his servant, and declaring for an assault with a *per quod servitium amisit*. But the cases are inserted here for the sake of uniformity; and it seems doubtful whether this action would not lie, it being an act unaccompanied with force, and the damages being given for the consequential injury, the loss of reputation, &c. to the family. This was recognized in the case above of *Tullidge v. Wade*, where it was attempted to set aside the verdict for excessive damages.

And per *Buller*, Just. 2 Term Rep. 167. an action merely for debauching a man's daughter, by which she loses her service, is an action on the case. Vide 2. Ld. Raym. 1032.

Gray v. Jeffries. 2. A father cannot maintain this action for *an excessive battery of his son*, and the subsequent injuries arising from it, as that he could not marry him as before.  
Cro. Eliz. 55.

### 3. Of Injuries to affect a Man as standing in the Relation of a Master.

Hambleton v. Vere. 1. If any person *inveigles away the servant or apprentice of another*, and prevails on him to quit his service, it is an injury for which this action lies.  
2 Saund. 169.

But in such case the person hiring must *have notice*, that the servant was then in the service of another, and not discharged; for otherwise he might hire the servant, ignorant of the circumstances, and so would do no injury, unless after notice he refused to discharge him,  
Anon. Winch 51.  
F N. B. 390.

For it is no excuse for the defendant, who has hired the plaintiff's servant, to say that *he did not entice him away*, but that the servant came away *of his own accord*, and hired with the defendant, if the defendant had notice that the servant had so deserted the plaintiff's service, and yet he still retained him.  
Pawcett v. Beavres, 2 Lev. 68.

2. A journeyman in any trade is a servant while in the employment of the master-tradesman; and an action lies for enticing him away, even though such journeyman worked only by the piece, and for no certain time.  
Aldridge v. Hart. Cowp. 54.

3. But where a person was so hired to work at a trade for a limited time, *under a penalty* not to discover the secrets of his master's trade, but having quitted his place, *the master sued him, and recovered the penalty*; this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service.  
Bird v. Randall, 3 Burr. 1345.  
2 Black Rep. 387. S. C.

4. "In general, if by any injury received from any person, a servant is *disabled in his service*, the master may recover damages for *such loss of service*, by this action."

As if a person digs a ditch in the highway, in which a man's servant falls and breaks a limb, the master may recover in this action for the injury for the loss of service; and so of other injuries of the same kind.  
1 Roll. Abr. 88.

### 2. Of Injuries to Personal Rights which a Person may receive, without Relation to others.

1. "If any person stands candidate for any elective office, and the returning officer *refuses him a poll*, and re-  
"turns

"turns another, trespass on the case lies against such officer."

As where the plaintiff declared that he was candidate for the office of bridge-master, within the city of London, and that the defendant as mayor, should hold the poll, and that he refused a poll to the plaintiff; the plaintiff recovered in this action: And it was further resolved, That it need not be averred in the declaration that the plaintiff would have been elected.

Sterling v. Turner,  
3 Lev. 50.  
1 Vent. 25.  
S. C.

2. If a person who is entitled to vote at any election for members of parliament, tenders his vote to the returning officer, which he refuses to admit or allow, he is subject to this action at the suit of the voter. For per Holt, The right of voting is a noble privilege, of which by this means he is deprived.

Ashby v. White.  
Salk. 19.

3. If any returning officer holds an election, or is called upon to make any return, wherein the right of a third person is concerned, and he makes a false return to such writ on such election; as a sheriff of members to parliament, a mayor of a corporation to a *mandamus* &c. an action on the case in these instances lies against them.

Bagg's case,  
11 Co. 99.

Where the right of a seat in parliament has been decided in favour of the person not returned by the returning officer, or where it could not be decided; as where the parliament was dissolved, an action at common law lies against the returning officer, but not otherwise. N. B. In *Ch. J. Willes* denied this case to be law. *Sed quære.*

Prideaux v. Morris  
Salk. 502.

But a further remedy is now given by statute 7 & 8 W. 3. c. 7. which enacts, "That if any sheriff or other officer makes a false return of members to serve in parliament, the party injured (that is, he who should have been returned) shall recover double damages and costs."

1. An action lies in pursuance of this statute in all cases of a false return, not solely where there has been a resolution of the house of commons deciding the right to the seat.

Sir Watkins  
Wynne v.  
Middleton,  
1 Wils. 125.  
2 Str. 227.

2. The statute is not merely penal, but is also a remedial one; on which ground an amendment was allowed.

S. C.  
S. C.

3. By the same statute, a return contrary to the last resolution of the house of commons, shall be deemed a false return; and so subjects the officer to this action. And by § 3. a return of more persons than are required by the writ or precept to be chosen, in like manner subjects the returning officer.

S. C.

4. As

2 Black.  
Com. III.

4. As to the case of *mandamus*, the return was formerly absolute, and so an absolute injury was done to the party, and therefore this action was given to him for redress; but now by statute 9 Ann. c. 20. the party may traverse the return, and is not put to his action.

Bull. N. P. 62.

Note. An action for a false return must be brought either in *Middlesex* where the return is, or in the county from whence it is made.

2. "If the King grants a *patent* for the sole use of any invention, and the patent be good in law, an action lies against any person for infringing it."

1. "If the action is brought by the patentee, it is incumbent on him to shew, 1st, That the invention was new: 2dly, That the specification is full and complete; that is, such as that the public, after the term of the patent is expired, may have the benefit, and be able to do without further instructions the thing for which the patent is granted."

1st. *The invention must be new.*

This is under statute 21 Jac. 1. c. 3. which declares all monopolies to be illegal, but allows letters patent for fourteen years for the sole working and making of any manner of new manufactures within the realm, to the true and first inventor, so as such be not contrary to law, mischievous to the state, by raising the price of commodities at home, hurt of trade, or generally inconvenient.

Edgeberry v.  
Stephens.  
2 Salk. 447.

And as a grant of monopoly or patent may be to the first inventor, by stat. 21 Jac. c. 3. so if the invention be new in England, a patent may be granted, though the thing was practised beyond sea before; for the statute speaks of new manufactures within the realm; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to this kingdom, and whether learned by travel or by study, it is the same thing.

"But the whole of the machine for which the patent is granted, need not be had."

Morris v.  
Branson.  
Sitt Westm. E.  
1776.  
Bull. N. P. 76.

For where the question was, Whether an addition to the old stocking-frame was the subject of a patent? Lord Mansfield said, That if the general question of law, viz. that there can be no patent for an addition, be with the defendant, that was open on the record, and he might move in arrest of judgment; but that that objection would go to repeal almost every patent that ever was granted: there was a verdict for the plaintiff, and 500l. damages; which was acquiesced in.

But

But in such case the patent must not be more extensive than the invention; therefore if the invention consists of an addition or improvement only, and the patent is for the whole machine or manufacture, it is void.

Per Buller Just.  
Rex v. Elfe.  
Sitt. West.  
Mich. 1785.  
Bull. N. P. 78.  
last edit.

2. "So the *specification must be full and complete in every respect*, as the public are to have the benefit of the discovery "at the expiration of the patent."

On a *scire facias* to repeal a patent, four issues were joined on the record: 1st, That the patent was inconvenient to his Majesty's subjects in general: 2dly, That the invention at the time of granting the patent was not a new invention as to the public use and exercise of it in England: 3dly, That it was not invented and found out by the defendant: 4thly, That the defendant had not by his specification particularly described and ascertained the nature of the invention, or in what manner the work was to be performed. It was laid down by Justice Buller, 1st, That a man to intitle himself to the benefit of a patent, must disclose the secret and specify the invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new addition or invention of their own: 2dly, He must describe it so that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and therefore if the specification describes many parts of an instrument or machine, and the patentee himself uses only a few of them, or does not state how they are to be put together and used, the patent is void: 3dly, If the specification be in any part materially false or defective, the patent is against the law, and cannot be supported.

Rex v. Arkwright.  
Sitt. West.  
Trin. 1785.  
Bull. N. P. 78.  
last edit.

Therefore in a case for infringing the patent for making steel trusses for ruptures, the patentee in the specification omitted what was very material for tempering the steel, which was rubbing it with tallow; Lord Mansfield held the patent to be void.

Liardet v. Johnson.  
Sitt. Westm.  
H. 1778.  
Bull. N. P. 79.

"So if the specification is in any respect *ambiguous or unintelligible*, or contains matter not in the thing for which the patent was granted, it is void."

As where the action was for infringing the plaintiff's patent for making patent-yellow; at the trial three objections were taken to the patent: 1st, That after directing that lead should be calcined, it directed another ingredient, namely, *vinium* to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and

Turner v. Winter.  
1 Term Rep.  
602.

by

by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary: 2dly, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a *marine salt*: 3dly, That all the things together did not produce the effect; for that the patent was to do three things, but this produced one only: These were held to be decisive objections to the patent, and that it was void.

Hunt v.  
Downman.  
Cro. Jac. 478.

3. This action was adjudged to lie against the defendant, who was the lessee for years, for preventing the plaintiff who had the reversion in fee, from coming on the lands to see if there had been any waste committed, and this though it was not shewn that any waste had been done.

Kinlyside v.  
Thornton.  
2 Black. Rep.  
811.

So case in the nature of waste lies against the tenant for years, whose term is expired, though there was a *covenant in the lease* not to commit waste.

Phillybrown  
v. Ryland.  
1 Stra. 624.

4. This action lies at the suit of a parishioner, for *excluding him from the vestry-room*; but it must be averred that the parish had a property in the room, and a right to meet there, or otherwise it might be taken to be the defendant's own room, to which he might only admit whom he pleased.

5. "Where any consequential injury arises to another from a breach of trust, the remedy is by action on the case."

Kettle v. Hunt.  
Mich. 27  
Car. 2 C. B.  
Bull. N. P. 78.

As where the plaintiff declared that he was a wheeler, and possessed of several tools relating to his trade, *viz.* an ax, &c. and by licence of the defendant deposited them in his house; that the defendant had detained them after request for two months, whereby he lost the advantage of his trade for that time; the plaintiff had a verdict; and it was moved in arrest of judgment, that the action should have been trover or detinue: But the court held the action well brought; for if the plaintiff had his goods again, detinue would be improper; and though a detainer upon request is evidence of conversion, yet it is not a conversion, and the *demand in this case being special*, the action ought to be so too.

"For it is no objection to this action that another will lie for the same offence."

Pitts v. Gaince  
& al.  
Salk. 20.

As where the plaintiff declared that he was master of a ship, which being laden and ready to sail, was seized by the defendants, whereby he lost the profits of his voyage; it was objected



objected that the action should be trespass *vi et armis*; but *per Holt*, the plaintiff declares not as owner, but as an officer for particular loss, and for it in this action he shall recover, though he might have had trespass on the possession: But the plaintiff does not declare for the tort itself (the seizing of the ship) but for the consequential injury, the loss of the voyage.

### 3. OF THE PLEADINGS AND EVIDENCE.

#### I. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. "The declaration in this action should state *the particular manner* in which the injury complained of has been committed.

For where the action was for overloading the plaintiff's Rigg v. Clark. horse, whereby he was injured, without shewing how he was Cro. Eliz. 194. overburthened, the declaration was for that held to be bad.

2. "Though the declaration goes for a longer time than the injury complained of entitles the plaintiff to a remedy for, yet if he is so entitled for *any part* of the time laid, he shall recover accordingly."

As where the plaintiff declared against the defendant as South v. Jones. parson, for not taking away his tithes when set out, but suffering them to lie, to the injury of the plaintiff's grass, from 1 Stra. 245. August the 20th (the day when the grass was cut) to the 10th of December following: though the declaration demanded damages from the time of cutting, which was wrong, as the parson was not obliged to take the grass away till it was made into hay; yet for part of the time, the plaintiff having received an injury, he should recover *pro tanto*.

3. In declaring on *escapes*, if the party escaped out of custody in *Essex*, and be seen abroad in *Hertfordshire*, the plaintiff may lay his action in *Hertfordshire*. Walker v. Griffiths. Mich. 5 Geo. 2. Bull. N. P. 67.

And if the plaintiff declares for an escape against the defendant as bailiff of a liberty, he ought to shew that the defendant had *execution and return of writs*. Miner v. Hinton. Cro Car 319.

In an action for an escape, it must appear that the *commitment* was of record.

For where in an action against the marshal, it was laid that the prisoner was brought before Sir *W. Chappel*, one of the justices of our lord the King, and was then committed to the Wightman v. Mullins. 2 Stra. 226.

the custody of the marshal, at the suit of the plaintiff, on demurrer it was held ill; for it did not appear that the commitment was of record; before which time he is not in the marshal's custody.

**Gold v. Strode.** If an executor brings a *sci. fa.* on a judgment to his testator, and has a judgment on it, whereupon a *ca. fa.* issues, and the defendant being taken, escapes; in the declaration against the sheriff, the plaintiff may declare briefly on a *sci. fa.* and judgment thereupon; but if he declares that he sued out a writ without setting out any judgment, it is an incurable fault.

**Bonafous v. Walker.** So an administrator may maintain an action in his own name for an escape of a prisoner, who was in execution on a judgment obtained by himself.

**Green v. Rennet.** 4. Where the plaintiff declared against the defendant, as attorney, for negligence in not signing a judgment in a cause wherein he had been an attorney to the plaintiff, and having set out in his declaration the writ under which the defendant in the original action had been arrested, he misrecited it; it was held to be fatal.

**Bastard v. Bastard.** 5. In declaring against a common carrier, it is sufficient to declare in general on the custom and undertaking, without setting out any sum which the plaintiff was to have paid for the carriage, but merely stating it "for reasonable hire;" for the carrier may recover on a *quantum meruit*.

**9 Co. 113.** 6. If a commoner declares against another person, whether commoner or not, for an injury to his common, he should state the offence to be "That his common, *tam ample modo habere potuit sed proficuum suum, inde per totum tempus amisit*;" for such injuries only may he have an action.

**Atkinson v. Tesciale.** And such general declaration for destroying the grass *per quod proficuum, &c.* is good without setting out "that defendant claims a right of common;" for that should be pleaded either by the defendant himself, or given in evidence on the general issue.

**3 Will. 230.** But in this action, if against the lord of the soil, the declaration should as against him state a surcharge and the particular injury.

**4 Mod. 414.** So the plaintiff in his declaration against a stranger need state no title in himself, for possession is sufficient against a wrong-doer; and the disturbance being the gift of the action, and the title only inducement, it cannot be traversed except the defendant sets up a title in himself and justifies; in

in which case the plaintiff in his replication must set out his title.

7. Where a *nuisance* has been continued after a former recovery in an action for the same, the plaintiff must declare for a continuance of the nuisance; for if he declares barely for a nuisance, the former recovery is a good plea in bar. Johnson v. Long. 1 Salk. 10.

8. Wherever the action is for a *disturbance to an easement*; as where a person claims a watercourse over the lands of another, if the action is *against the tenant of the freehold* for the disturbance, the declaration should shew a right in the plaintiff either from a grant or by prescription; but if it does not appear that the land over which the easement is claimed is the defendant's freehold, it is sufficient in the declaration to state the injury only; but then if the defendant in his plea sets out a right, the plaintiff must not demur, but set out his. Vernon v. Goodrich. 1 Stra. 5.

But in declaring against the defendant for turning a watercourse, it is good to state it as an *ancient watercourse*, which has been accustomed to run to the plaintiff's mill, without setting out any prescription; for those words are tantamount. Anon. Cro. Car. 499.

9. In declaring for a disturbance of the plaintiff's *fair*, it is not necessary to set out any title either by grant or prescription. Dent v. Oliver. Cro. Jac. 43.

10. "In this action the day laid in the declaration is not material, provided the plaintiff can prove the injury for which the action is brought to have been committed any time before the bill filed."

As where the plaintiff declared for an injury to an ancient ferry of which he was possessed, he had sued out his *latitat* on the 22d of *August*, and declared for the defendant carrying over passengers on the 17th of *August*, but at the trial could not prove the carrying of any persons till the 25th of *September*; and a case being reserved, whether such evidence supported the declaration, being after the time of suing out the *latitat*? the court held, That evidence of the injury any time before the bill filed, which was in *Michaelmas* term, was good. Foster v. Bonner. Cowp. 454.

## 2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. "The general issue in this action is not guilty; and upon it the defendant may give in evidence any matter which destroys the plaintiff's action; for the declaration charging" 1 Will. 45.

" charging a particular injury or offence, *not guilty* denies  
" such injury or offence."

Duel v. Harding.

9 G. 1. per

Raymond.

Bull. N. P. 78.

As in case for beating plaintiff's servant, *per quod servitium amisit*, defendant upon *not guilty* may give in evidence, that plaintiff *did not lose his service*; for that is the injury charged and denied by *not guilty*.

2. " So under the general issue, the defendant may give  
" a justification in evidence, for if he is charged with that  
" as an offence which is a lawful act, he is *not guilty*."

Slater v.

Swann.

2 Stra. 872.

As where the trespass laid was for beating the plaintiff's horse, *per quod* he lost the use of him for several days, the defendant pleaded *not guilty*, and he was allowed to give in evidence that he kept a shop, and that the plaintiff put his horse and cart so directly before the defendant's door, that the customers were prevented from coming to his shop, wherefore he whipped the horse away; and the defendant had a verdict.

3. In the case of escapes, by stat. 8 & 9 W. 3. c. 26. § 26.  
" The marshal or warden of any prison shall not in any  
" action for an escape against them give in evidence a retak-  
" ing upon fresh suit, *except the same be specially pleaded*; nor  
" shall any special plea be received, unless oath be made in  
" writing by the marshal or warden, and filed, that the pri-  
" soner did without defendant's knowledge, privity, or con-  
" sent, make such escape.

West v. Eyles.

2 Black. Rep.

1059.

In an action against the warden or marshal, an affidavit under the statute, that the escape, " if any such escape there was, without defendant's knowledge," is good with these words.

Sir Ralph Bo-  
vey's case.

1 Vent. 211.

Bonafous v.

Walker.

2 Term Rep.

126.

3 Ref.

If plaintiff in his declaration sets out a voluntary escape, defendant may plead that he took the party on fresh suit, without traversing the voluntary escape; for the alledging it is nowise necessary to his action, but it should come in the replication: So under a count for a voluntary escape, the plaintiff may give a negligent one in evidence.

Jones v. Pope.

2 Lev. 191.

And note, That actions for escapes being founded in *malicio*, are not within the statute of limitations.

Bull v.

Steward.

1 Will. 355.

The defendant, in an action for an escape, shall never be allowed to plead or give in evidence that the first suit was improperly commenced; for as he could justify under the process, he shall not be allowed to take advantage of any irregularity.

4. By statute of West. 2. c. 46. " A commoner may take in  
" part of the common for a dairy, sheep-cot, or curtilage."

It is therefore a good plea to an action against a commoner for inclosing part of the common, that he did it for some of these purposes. But it should appear by the plea that such enclosing was for his own use, or for his servant or shepherd. Nevill v. Hamerton.  
3 Lev. 61.

5. "Where either party in this action prescribes for an easement, the other cannot set up a contrary prescription without a traverse of that set up by the other."

For where in an action against the defendant, for diverting an ancient watercourse, he pleaded that he was seised of two closes through which the water ran, and that he and all those whose estate he had, used to water their cattle there on said water, "but that, for convenience of watering, they had a right to dig a ditch near the said watercourse," and so concluded without a traverse: this being a prescription varying the first, was held to be bad without a traverse. Murgatroid v. Law.  
Carth. 117.

So where the plaintiff declared, That he was entitled by prescription to a fold-course for his sheep in certain lands, and that the defendant had enclosed them, the defendant pleaded a contrary prescription to inclose, and held bad on demurrer for want of a traverse. Spooner v. Day & al.  
Cro. Car. 432.

#### 4. OF THE EVIDENCE.

##### I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

And, 1st, "In all cases of this action it is necessary that the evidence should so apply to the offence or injury charged, that by no presumption such offence or injury can be supposed to arise from any other cause."

For where the plaintiff declared, that the defendant in giving evidence in an action between the plaintiff and another person, had used words in derogation of the plaintiff's character, whereby the jury gave him but small damages in that action, this action was held not to lie; for it could not appear how the jury were influenced in their verdict by those words. Harding v. Bedman.  
Hutt. 11.

2. "In trespasss on the case, all *material averments* only are put in issue, and nothing more; and these only are required to be proved."

Therefore where the plaintiff in an action against his tenant of certain lands, for leaving them out of tenantable repair, declared, first as *seised in fee*, and it was proved that Winn v. Walker.  
4 Black. Rep. 840.

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he was only *tenant in tail*, yet it was held not to be a material variance, because that the lease of tenant in tail is not void, but voidable only by the issue in tail, and could not be avoided during the lessor's life. 2d. Where he declared "That the tenant had undertaken to leave it in tenantable repair," and it was proved to be, "To leave it in good repair as the tenant found it," it was held not to be a variance, the land being proved to be in tenantable repair when the tenant entered.

"For this action, being in its nature transitory, material averments only are put in issue."

*Drewry v. Twiss.*  
4 Term Rep.  
358.

Therefore in case of negligence in running down the plaintiff's boat, near the half-way reach in the river *Thames*, the evidence proved it to have been done in the half-way reach: this was adjudged not to be a material variance.

*Frith v. Gray.*  
H. 7. Oct. 3.  
quot. per *Grose*.  
Just. 4 Term.  
Rep. 561.

So where the action was on an agreement to procure the plaintiff a booth at a horse-race on *Barnet Common*; the declaration stated *Barnet Common* to be in the county of *Middlesex*; in evidence it was proved that the whole of *Barnet Common* was in *Hertfordshire*; and the objection of a variance being taken, Lord *Mansfield* and the rest of the court (on a motion for a new trial) held, That the gift of the agreement being to procure the plaintiff a booth at *Barnet Common*, that it was immaterial whether it was in *Middlesex* or *Hertfordshire*, and so that the words might be rejected in the declaration.

*Gunter v. Clayton.*  
1 Lev. 85.  
*Alexander v. Macaulay.*  
1 Term Rep.  
611.  
Decided on the authority of the case.

3. In escapes, if the plaintiff declares that he had a good cause of action against *J. S.* and sued out a *latitat* against him, and that the defendant arrested him, and suffered him to escape, he must prove a cause of action, or he will be nonsuited, though the cause of action need not be for the sum mentioned in the declaration; but if the declaration be of a *latitat* in a plea of trespass, and the writ produced be of a plea of trespass *et etiam billae* 20l. it will not support the declaration.

*Tildar v. Sutton*  
Pafch. 2 Ann.  
per Holt. *John-  
son v. Gibbs.*  
per Holt, at  
Exon.  
Bull. N. P. 66.

2. Plaintiff in an action for an escape need neither produce the *ca. fa.* nor the copy of it, but the return is sufficient; neither need the *ca. fa.* be set forth in the declaration. But if it be set forth with a *scilicet* that issued such a day, it may be doubtful whether he ought not to prove the *ca. fa.* with a true teste; otherwise, against the sheriff the warrant to the bailiff is sufficient evidence, though it would not be so to him.

*Rex v. Ford*  
2 Salk. 690.

3. To prove a voluntary escape, the party escaping may be a witness; for it is a matter of secrecy between him and the gaoler.

So is the confession of the under-sheriff good evidence Lord Raym. to charge the sheriff, for in effect it charges himself. 190.

In an action against the sheriff for an escape, the return of Blatch v. *non est inventus* on the writ is sufficient proof of the delivery Archer. of the writ to the sheriff, and the bailiff's name indorsed is Cowp. 63. sufficient proof that a warrant was directed to him.

4. If the action is brought for a *rescue*, the plaintiff must Wilton v. prove, 1. The original cause of action: 2. The writ and Geary. warrant, which must be by producing sworn copies: 3. 6 Mod. 211. The arrest to shew it is legal: 4. In point of damage it is expedient to prove that the person arrested has become insolvent, or is not to be found; but this is not *necessary* to support the action; for the defendant having been guilty of a breach of the law, shall find no favour.

5. In an action *against the master* for an injury done by Jarvis v. the servant, the servant is an inadmissible witness, unless he Hayea. shews a release from his master; for if the plaintiff recovers 2 Stra. 1083. against the master, the servant is liable over to him for his own misconduct; and if the plaintiff fails against the master, he may sue the servant, so that either way he is *interested*.

So where the action was against the master for negligence Green v New in the servant, who was a turncock to the defendants, in not River Com- stopping a pipe, by the bursting of which the plaintiff's pany. horse received an injury; the servant was called as a witness, 4 Term Rep. 389. but was objected to as incompetent without a release, as he came to disprove his own negligence, which if established by the verdict, would be a ground of action against himself by his employers; and he was rejected on that ground: for the verdict which the plaintiff would obtain against his masters, might be given in evidence in an action by them against him, to ascertain the quantum of the damage, though not as to the fact of the injury, that he being therefore interested to diminish those damages, was an incompetent witness.

"But where the injury is done in the master's company, and not by the servant alone, there he is a good witness."

Therefore in an action against the master, for that by Pull. N. P. the negligently managing his barge he had run down that 77. of the plaintiff, Lee, Ch. Just. examined all the men to prove no neglect, the master himself being then asleep in the cabin.

“ But where the action is by the master for an injury done to the servant, with a *per quod servit. amisit*, there the servant may be an evidence (though the case of *Dingley v. Westbourn*, 1 *Str.* 414. is contra) from the authority of the following cases.”

*Duel v. Harding.*  
1 *Str.* 595.

The servant beaten was in this case allowed to be a good witness on an action brought by the master

*Lewis v. Fogg.*  
2 *Str.* 944.

So in an action for defendant's dog having bit the plaintiff's apprentice, *per quod servit. amisit*, the apprentice was admitted as a witness.

*Cock v. Watham.*  
2 *Str.* 1054.

So where the action was for debauching the plaintiff's daughter, the daughter was examined as a witness.

For in these actions the servant is no way interested in the event, the action being given to the master, not for the injury, but for the consequences of the injury.

*Per Holt at Horsham.*  
13 *W.* 3.  
*Bull. N. P.* 73.

6. In an action against a carrier, the plaintiff ought to prove that the defendant used to carry goods for hire, and that the goods were delivered to him or his servant to be carried; and if a price be alledged in the declaration, it ought to be proved to be the usual price of such a stage, but there needs no proof of a price certain; and if a price be proved, there needs no proof that defendant is a common carrier, *for every one carrying for hire is deemed so in law.*

*Moore v. Wilson.*  
1 *Term Rep.*  
659.

So where the plaintiff declared against the carrier, on his undertaking to carry for a certain price to be paid by the cognisor, and on evidence it appeared that it was to have been paid by the cognisee, it was held to support the declaration.

“ Where the question turns upon whether the goods were delivered to the carrier or not, this case has been decided as to the competency of the person delivering them being a witness.”

*Davies v. Phillips.*  
G *Hall Sitt.*  
*Hill* 16 *Geo.* 3.  
M38.

In an action against a carrier for the loss of goods delivered at the inn-yard, the defence was that they were never delivered there, or if so; that it was to a sharper who had gone off with them: to prove the delivery the plaintiff called the person from whom he had bought the goods, and who had delivered them at the inn; he was objected to, because if the plaintiff did not recover in this action, and the goods were not properly delivered, he would be liable to the plaintiff: to this it was answered, that the plaintiff having adopted the delivery, could never after call on the witness: but *per Lord Mansfield*, the question is,



Were the goods delivered at the inn or not? if they were not properly delivered or embezzled by the witness's servants, in either case he is liable to the plaintiff, therefore he is interested and inadmissible.

7. If the plaintiff's action is for a surcharge of his common, he need not shew that he had actually turned any cattle on the common at the time of the surcharge laid; it is sufficient to shew that by the number turned in by defendant, he could not have enjoyed his common in so ample a manner as he was entitled. *Wails v. Watling*, 2 Black. Rep. 1233.

And in such case it is no defence to the action that the plaintiff himself had surcharged the common, for that is a tort for which he is himself liable to an action; and one tort cannot be set off against another. *Hobson v. Food*, 4 Term Rep. 71.

8. If the action is for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value, *communibus annis*, not every particular sum received. *Lord Montague v. Lord Preston*, 1 Vent. 171.

## 2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. In the case of escapes, the gaoler or officer can take no advantage of the error in the process; and so if he pleads no escape, it seems he shall not be allowed to give in evidence no arrest; for the plea admits the arrest. *Rex v. Fell*, 1 Salk. 272.

2. In cases of rescue, the defendant may give in evidence, in mitigation of damages, the ability of the person rescued, and that he is still amenable to justice; yet if the jury give the whole debt in damages, no new trial will be granted. And in this case the party rescued may be an evidence, and though *particeps criminis*, if the defendant be guilty, yet shall this only go to his credit, not to his competence. *Wilson v. Geary*, 6 Mod. 211.

3. In an action for a *false return of non est inventus* on mesne process, the sheriff's bailiff is an inadmissible witness to prove an endeavour to execute the writ, for he has given security to the sheriff, so that it is his own cause in effect. *Powel v. Hord*, 1 Stra. 649.

## 5. THE VERDICT, JUDGMENT, AND COSTS.

1. It seems a general description of the verdict in this action, that if the substance of the issue is found, it is sufficient.

As where in an escape the plaintiff declared on a taking by the defendant, the then sheriff, and it appeared that he had King v. Andrews, Cro. Jac. 380.

had been taken by a former sheriff, but *bonded over in custody* to the defendant, the issue was held to be well found.

Oates v.  
Machen.  
1 Stra. 595.

So where the declaration in escape alleged that the prisoner was surrendered at the justice's chambers in the parish of St. Bride; and it was found to be in St. Dunstons, it was held yet to be good.

Ferror v.  
Johnson.  
Cro. Eliz. 33.

So where in a case for disturbing the plaintiff in an office, he made a special title, and the jury found a title variant from that set out, yet the plaintiff had judgment.

Gravenor v.  
Meers.  
Cro. Eliz. 384.

And lastly, In a case on the sale and warranty of *several*, and the jury found a verdict as to the sale of *one*, on the variance alleged, the court over-ruled it; for the action was on the *deceit*, not on the warranty.

Powel v. Hord.  
1 Stra. 649.

2. In an action against the sheriff for a false return on mesne process, the jury may give the whole debt in damages.

#### OF THE COSTS.

By stat. 2 W. & M. c. 5. "Treble costs and damages are given against a person guilty of a rescous or a distress."

Lawson v.  
Storie.  
Balk. 205.

If plaintiff brings a case on this rescous, which he might do by common law, he shall recover treble costs as well as treble damages,

## PART THE SECOND.

### CHAPTER I.

#### Of Writs of Mandamus.

**T**HE Writ of Mandamus is a prerogative writ, issuing out of the court of *King's Bench*, by virtue of that general superintendency which that court possesses over all inferior jurisdictions and persons. It is the proper remedy to enforce obedience to acts of parliament and the king's charters: to revent disorders from a failure of justice and defect of police: every subject is entitled to it on a proper case shewn to the court, and it ought in all cases to be granted where the law has provided no specific remedy, and where in justice and good government there ought to be one.

Per Ld. Mansfield.  
3 Burr. 1267.

Writs of mandamus, according to their object, are either to restore a person deprived of some corporate, or other franchise or right, or to admit a person legally entitled to the same rights.

In treating of the proceedings under this writ, I shall, 1st, consider for what the court will grant a mandamus: 2dly, for what the court will not grant a mandamus: 3dly, The proceedings in granting it: 4th, Of the writ itself: 5th, Of the proceedings under the stat. 9 Ann. 26.

#### FOR WHAT THE COURT WILL GRANT A MANDAMUS.

A Mandamus lies to admit or restore Persons to every Description of Corporate Offices.

Raym. 431,  
1 Sid. 14.  
5 Mod. 257.  
Stil. 32.  
4 Burr. 1999.  
1 Vent. 77.  
Poph. 176. Cro.  
Jac. 506.  
Stil. 355.  
52. Bull. 122.  
1 Vent. 19.  
2 Roll Ab 455.

As mayor, burghes, common-council-man, recorder, town-clerk, alderman, bailiff, and such offices as are part of belong to corporations.

2. It

2. It lies to the Officers of Corporations to do certain Acts connected with their Duty as Corporators.

1 Lev. 91.  
Raym. 69.  
4 Mod. 638.  
Stil. 299.  
1 Burr. 117.  
1 Stra. 1157.  
2 Stra. 1003.  
2 Stra. 1080.  
1 Stra. 578.  
2 Stra. 948.

As to admit persons to offices in the corporation: To admit those having right to their freedom: To call a corporate meeting: To hold corporate elections: To the steward of the borough to attend with the corporation-books, &c.

3. To admit or restore Persons claiming Rights or Appointments in Colleges or Corporations of such public Erection.

Raym. 101, 31.  
1 Mod. 82.  
1 Sid. 29.  
Cont. Carth. 92.

As master or fellow of a college, fellow of the college of physicians, &c.

Or calling upon Persons having Authority, to execute their proper Duties in such Colleges, or to do certain Acts belonging to their Appointments.

Cowp. 577.  
1 Stra. 557.  
2 Ld. Raym.  
1334.  
3 Burr. 1647.  
1 Stra. 58.

As to the warden of a college to put the college seal to an answer in chancery: To the chancellor of an university to restore a person to degrees: To the keepers of the university seal, to put it to the appointment of high steward: To restore an under schoolmaster to a school of royal foundation, &c.

4. To admit or restore Persons claiming Rights or Offices belonging to any inferior or Ecclesiastical Court.

1 Sid. 94, 152.  
2 Lev. 75.  
Raym. 56.  
1 Sid. 40.  
Show. 289.  
Mod. Caf. 18.

As attorney to the marshalsea court: Steward of courts leet: Clerk of the peace: Register of the ecclesiastical court, &c.

Or to Persons having Authority therein to do all legal Acts connected with their Duties and Offices.

2 Roll. Rep.  
82, 85.  
2 Stra. 1207.  
1 Will. 283.  
1 Stra. 113.  
Raym. 235.  
1 Vent. 335.  
1 Sid. 281.  
1 Lev. 186.  
1 Stra. 552.  
1 Vent. 115.  
Raym. 439.  
Caf. temp.  
Hardw. 120.

As to the lord of the leet to administer the oaths to the *portreeve*: To compel the tenants of the manor to attend at the court leet to make a jury: To the steward and homage of a manor to hold a court, and present purchasers of burgage tenements: To the judge of an inferior court to proceed to a judgment on a verdict: To the judge of the ecclesiastical court to grant probate of a will, or administration to whom it belongs: To the spiritual court to administer the oath to one elected churchwarden: To the

the spiritual court to absolve an excommunicated person, &c. 4 Burr. 2295.  
2 Roll. Rep. 107.

5. To admit or restore Persons to Benefices or Dignities in the Church, or other Places of Ecclesiastical Function, or do Acts connected with their Offices.

As to the warden of a college to admit a chaplain: To 2 Stra 798.  
restore a preacher: To admit, institute, and induct into a 3 Burr. 1266.  
canonry or prebend: To admit a parish-clerk: To restore a 2 Stra. 1082.  
sexton: To swear in a churchwarden: To try the right of 1 Stra. 159.  
officiating in chapels, by admitting a person to the curacy: Cowp. 412.  
To trustees of an endowed meeting-house, to admit one as 3 Burr. 1420.  
pastor to the use of the pulpit, &c. 2 Burr. 1043.  
3 Burr. 1265.

6. To admit or restore Persons claiming the Freedom of or Offices in any Public Company, or to do Acts connected with them.

As director of the amicable assurance company: A quaker 1 Stra. 696.  
to the freedom of the *Turkey* company: Yeoman of the wood 2 Burr. 1000.  
wharf to the corporation of *London*: Ale-taster: To the clerk 2 Stra. 832.  
of the company to hand over the company's books on his 1 Stra. 608.  
being removed, &c. 2 Stra 879.

7. To Justices of the Peace, to carry into Execution the several Statutes under which they are empowered to act.

As to make convictions: To register a meeting-house: To 1 Stra. 530.  
swear an overseer to his accounts: To grant warrants to levy 1 Wilf. 21.  
the balances of old overseers accounts: To make a warrant 4 Burr. 1991.  
of distress for a poor's rate: To appoint overseers to a new 1 Wilf. 125.  
township or hamlet: To allow constables their charges in 2 Stra. 992.  
providing carriages for the king's forces: To sign poor's 1 Wilf. 131.  
rates: To swear in overseers of the highways, or to make a 1 Stra. 512.  
rate to reimburse such surveyors of the highways: To proceed 1 Term Rep. 374.  
to judgment on a seizure: To take articles of surety of 1 Wilf. 138.  
the peace, &c. 1 Stra. 42.  
Carth. 450.  
Cas temp. H. 128.

8. To compel Corporations to proceed to Election, under stat. 11 Geo. 1. c. 4. s. 2.

Under this head it is to be observed, That the writ of Bull. N. P. 213.  
mandamus being for the purpose of enforcing obedience to  
charters, when the election was ordered to be holden on a  
certain day, if that day was past, a mandamus could not order  
the election to be holden on another day, for that would not  
enforce,

enforce, but be inconsistent with the charter: it was therefore necessary to preserve the corporations to remedy that evil; it was therefore enacted by that stat. "That if no election should be had of the mayor, or other chief officer on the charter-day, that the corporation should not for that be dissolved, but might meet at the town-hall the day after, and proceed to election; and if no election was made on the charter-day, or in pursuance of that act, or being made should after become void, that the court of *K. B.* might grant a mandamus, requiring an election to be made."

Under this statute it has been held,

*Case of Boffiney, alias Tintagel.* 1. That where there was a mayor *elect* and *sworn into the office*, the court notwithstanding granted a mandamus, it appearing that the election was *merely colourable*; for the intent of the act was to give the corporation a rightful officer, whereas this pretence would waste the whole year, though the court might refuse it if there was a probable election.  
2 *Stra.* 1003.  
*Case of Aberystwith.*  
2 *Stra.* 1157.  
S. P.

*Rex v. Mayor, Bailiff, and Burgeſſes of Cambridge.* So where the corporation elected for mayor an officer of the army just gone to *America*, and not likely to return within the year, and that known to the electors at the time of the election, the court held this to be clearly a colourable election, and granted a mandamus to proceed to the election of another.  
4 *Burr.* 2008.

*Rex v. Banks.* But in such case, where the officer is in possession, the election must appear to be clearly colourable, and the mayor, or officer *de facto*, must be made a party to the rule.  
3 *Burr.* 1452.  
and *caſ. ibid.*

2. "The power given by this statute, is limited to no time."

*Case of Corporation of Oxford.* For the court have granted a mandamus to proceed to the election of a mayor, where there has been no legal mayor for four preceding years.  
Bull. N. P. 201.

*Case of Corporation of Scarborough.* 3. The statute is, not confined to the election of a head officer of the corporation only, but the court will order, under the statute, the corporation to proceed to the election of the inferior and constituent officers of the corporation.  
2 *Stra.* 1180.

*Rex v. Edyvean & Spiller.* 4. Under the statute, public notice in writing of the election is to be fixed in some public place in the borough: and where a mandamus was granted to elect a mayor for the borough of *Bodwin*, and a rule made that public notice should be affixed in the market-place, which was done; the court granted  
3 *Term Rep.* 352.

granted an attachment against the defendants for not attending (their presence being necessary to the election) though they had only been served with a copy of the rule, but not with the mandamus, or with the original rule.

These are the principal cases in which a mandamus will be granted; but as its object is to provide for every defect of justice, and the relief it gives of general extent, how far the court will go in granting this writ, will better appear by considering,

## 2. FOR WHAT THE COURT WILL NOT GRANT A MANDAMUS.

1. "The court will not grant a mandamus to a person to do any act whatever, where it is doubtful whether he has by law a right to do such act or not; for such would be to render the process of the court nugatory; as if the person had no right, he might so return it."

As where the application was to the court for a mandamus to be directed to the Bishop of Ely, commanding him to hear an appeal as visitor of Trinity College, Cambridge, made on an affidavit that the bishop declined hearing the appeal till he was satisfied that he was visitor; on shewing cause it appeared not clear to the court that the bishop was visitor, and in fact that he had never exercised that right, the court therefore refused the mandamus; for the court will not grant a mandamus to compel any person to exercise a jurisdiction which that person is not most certainly and clearly appointed to, and bound by law to exercise. Rex v. Bishop of Ely.  
1 Will. 266.

So where the application was for a mandamus to the church-wardens of St. Botolph's, Bishopsgate, commanding them to call a vestry in Easter week, to elect new churchwardens; it was refused, as there was no instance of such a mandamus; and the court could not take notice who had a right to call a vestry, and consequently did not know to whom it should be directed. Anon.  
1 Stra. 686.

2. "The court will not grant a mandamus where the office claimed is not of a certain permanent nature, nor where it cannot give a complete remedy."

As where the motion was for a mandamus to the bishop of London, to license the Rev. Mr. Dawney, to preach as lecturer of St. Ann, Westminster; but it appearing that the lectureship was not endowed, but depended on the voluntary subscriptions of Rex v. Bishop of London.  
1 Will. 11.

*of the inhabitants*, the court held the office to be of such a nature that it would not interpose.

*Rex v. Bishop of London.*  
1 Term Rep. 331.  
*Rex v. Field & al.*  
4 Term Rep. 125. S. P.

And in this case, which was for a mandamus to the bishop, *to license a lecturer to St. Luke, Chelsea*, the same objection as in the last case was taken and allowed; and beside, that unless there was an endowment or immemorial custom to appoint a lecturer without the consent of the rector, that it would be nugatory to grant a mandamus to the bishop, as the rector might refuse the use of his pulpit to the person licensed, or maintain trespass against him in case he used it, the freehold being in the rector; so that the mandamus could not give the party complaining complete redress.

“ But it is not necessary, in order to induce the court to interfere by mandamus, that the office is of a *freehold nature*; it is sufficient that it is an *annual office*, and has fees *annexed*.”

*Rex v. Commissioners of the Land Tax of St. George in the Fields*  
1 Term Rep. 146.

This was the doctrine held by the court in this case, which was an application to the court for a mandamus to the defendants, *to proceed to the election of a clerk*, and which was opposed, on the ground that the office was not of such a nature as would induce the court to interfere; but the mandamus was granted, the clerk being entitled to certain *poundage fees under the statute*, which are granted to him by an annual warrant from the commissioners.

“ But where the office is of a *mere private nature*, the court will not grant a mandamus.”

*Stamp's case.*  
1 Sid. 40.  
Vid S. P.  
1 Vent. 143.  
Mod. Caf. 18.

Upon which ground the court refused a mandamus to restore a person to the place of *steward of a court baron*; but it will be granted to restore a person to the office of *steward of a court leet*, because that concerns the administration of justice.

“ But in all cases of public concern, or of offices of a public nature, the court will grant a mandamus.”

*Anon.*  
1 Stra. 696.  
*Rex v. March, Governor of the Turkey Company*  
2 Burr. 1000.

As to swear in a director of the *Amicable Assurance company*, which is a company created by charter from the crown; so to compel an admission into a trading company.

3. “ The court will not grant a mandamus *where there is any other specific legal remedy* by which the person complaining may obtain redress.”

*Rex v. Governor and Company of the Bank of England.*  
Doug. 506.

Therefore in application for a mandamus to the bank, to compel them to transfer stock, the court refused it, because *the party had a remedy by action on the case*, if they refused.



So where the application was for a mandamus to be directed to the old churchwardens to hand over the parish-books to the new ones, the court refused it; for they might have a right to keep them, and that right might be tried by an issue at law. *Rex v. Street & alt. Mod. Caf. 98.*

So where the application was for a mandamus to be directed to the mayor of C. to admit Mr. Grimwood to the office of recorder, on the ground that the mayor admitted several illegal votes for Mr. Smithies who had been admitted and sworn in, and had rejected several legal ones of Mr. Grimwood's, the court refused it, on the ground that the remedy was by quo warranto to set aside the election of Smithies, he being in possession of the office. *Rex v. Mayor of Colchester. 1 Term Rep. 259. Vid. S. P. Rex v. Bishop of Chester. 1 Term Rep. 396. Vid. Rex v. Guardian to the Poor in Canterbury. 1 Black. 667.*

So the court refused a mandamus to the benchers of an inn of court, commanding them to call a person to the bar; for the proper remedy in such a case is by appeal to the twelve judges. *Rex v. Benchers of Gray's Inn. Doug. 339.*

4. "Wherever a controuling power, or power of appeal, is exclusively lodged in any person or corporation, the court will not grant a mandamus: this is the case of visitors of colleges, or others of spiritual foundation."

For the acts of a visitor cannot be questioned in any court of law. *Rex v. Bishop of Chester. 1 Wils. 206.*

"But this is the case only where the visitor is acting within his visitatorial power."

For where the Bishop of Ely was visitor of Peterhouse College, and by the statutes of that college the fellows are to return two to the visitor, who is to appoint one to be master of the college on a vacancy; and the fellows having returned two, the bishop appointed neither, but nominated another person to be master; it was held by the court, That his power was restrained and limited in this particular under the statutes, and that therefore the court could compel him to act within his authority, and accordingly made the rule absolute for a mandamus to him, to admit one of the two so returned to him by the fellows. *Rex v. Bishop of Ely. 2 Term Rep. 290.*

So where the Bishop of Chester was visitor of Manchester College, and he accepted the place of warden, it was held, That his visitatorial power was suspended, and that a mandamus might go to him in his other capacity as warden. *Rex v. Bishop of Chester. 2 Stra. 798.*

"So the court will compel a visitor to act as such, though they will not interfere with his decision."

As where a mandamus was prayed to the Bishop of Lincoln as visitor of Lincoln College, Oxford, to receive, hear, and determine *Rex v. Bishop of Lincoln. Trin. 25 Geo 3. Cit. 2 Term Rep. 338.*

*determine an appeal of Dr. Halifax, who complained of an undue election to the rectorship of that college; the court held, That where the statutes have appointed a visitor, who is to interpret the statutes of a college, and an appeal is lodged with him, the court will compel him to hear the parties, and come to some decision, though they will not oblige him to go into the merits; for it is sufficient if he decides that the appeal comes too late.*

6. "Where any other court has competent jurisdiction, the court will not interfere by mandamus to controul it."

*Rex v. Dr. Hay.* Therefore where the *validity of a will is contesting in the*  
*4 Burr. 2295.* *spiritual court*, and a suit then depending there concerning it, the court will not grant a mandamus to the judge of such court to grant a probate to any particular person: so the court will not grant a mandamus to the judge of the ecclesiastical court to grant administration *durante minore etate*, for the law has not decided who is entitled to such administration; but in the case of a common administration, the next of kin being entitled to it by law, a mandamus may go to that effect.

*Smyth's case.*  
*2 Stra. 892.*

*Vid. Rex v. Dr. Hay.* 1 Black.  
 640.

3 Lev. 309.  
 3 Mod. 332.  
 Show. 217, 251.

So it will not lie to admit a proctor into the spiritual court, for that court has jurisdiction over its own officers.

*Skin. 290.*  
*Carth. 160.*

7. "The court will not grant a mandamus to a person, commanding him to do any thing which he is not under a legal necessity of doing; that is, if the law has left a discretion in him, the court will not controul it."

*John Giles's case.*  
*2 Stra. 881.*

As where the application was for a mandamus to be directed to the justices of peace, to compel them to grant a licence to *Giles* to keep an ale-house, it was refused; for it is discretionary in the justices to grant or to refuse it.

*Rex v. Proprietors of the Birmingham Canal Navigation.* 2 Black.  
 Rep. 708.

So where under a stat. 8 Geo. 3. for an inland navigation to *Birmingham*, commissioners were empowered to make a cut or canal from a place called *Newhall Ring*, near *Birmingham*, and from such other places near the town as might be found convenient; the commissioners had begun a cut in another direction, and this application was to compel them to make a cut to *New Hall Ring*; but it was refused, for the act only gives an authority to the commissioners to proceed, not a command: they may desert or suspend the whole work, and a fortiori any part of it.

*Case of Andover.*  
 2 Salk. 433.

8. "If several have been deprived of any corporate offices or rights, each must have a separate mandamus, for one writ cannot go to restore many; for the foundation of the writ is the turning out; and the turning out of one is not

"the

“ the turning out of another, and they may be removed for  
 “ different causes; and the wrongs being distinct, so should be  
 “ their remedies.”

### 3. OF THE PROCEEDINGS IN GRANTING A MANDAMUS.

1. “ The court will often grant a mandamus *in the first instance*, on motion, under particular circumstances.”

As where the motion was for a mandamus to the defendants *Rex v Fisher*  
 to *fix a poor's rate*, which it was proved was regularly made, & alt. justices  
 but the defendants refused to allow it. *Per C. J. Ryder*, If of Berks.  
 we grant a rule to shew cause, while it is depending, the poor Sayer's Rep.  
 may starve, as no overseer will disburse any money until the 16a.  
 allowance of the rate for collecting it; therefore let it be absolute in the first instance.

2. “ But the usual mode is by rule to shew cause; as to  
 “ which it has been settled,”

That in the application to the court, *the nature of the office* respecting which the application is made, must be shewn to the court; for as there are certain cases in which the court will not interfere by mandamus (*ante* fol. 665) the office to be affected by the mandamus applied for, might be of that description.

Therefore, where it was to swear in one who was elected *2 Mod. 316.*  
 one of the *eight men of Abbourn Court*, it was denied, as it did not appear what the nature of the office was.

3. “ Where a person applies for a mandamus, he must  
 “ shew *some title or colour of title in him*, to induce the court  
 “ to interfere.”

Therefore, where the application was for a mandamus to *Rex v. Jotham.*  
 the trustees of a dissenting meeting-house, to restore one *Lloyd* 3 Term Rep.  
 to the office of minister of the congregation; in his affidavit 575.  
 he only stated his appointment, and that *he conceived that he could not be removed without his consent, unless he should misbehave, but that his appointment was for life.* This was opposed, on the ground that a former minister had been removed, that *Lloyd* had no licence, was not regularly ordained, and had not complied with the regulations of the act of toleration. The court were of opinion, that he had not made out any, even a *prima facie* title to this office, which was necessary; and refused the mandamus.

*Rex v. Vintners company,*  
Mich. 25  
Geo. 2.  
Bull. N. P.  
200.

So where the motion was for a mandamus to the warden of the vintner's company, to swear *J. S.* one of the court of assistants; the affidavit was only that *he had been informed* by some of the court of assistants *that he had been elected*, but no positive affidavit of an election; the court nevertheless granted a rule, there being an affidavit that he had applied to inspect the court books to see if he had been elected, and was refused, without which affidavit the court would not have granted the rule; but said, that had there been a positive affidavit of his election, that they would have granted that writ in the first instance.

“ But though, where a party so applies for a mandamus, whereby he is to be restored to a corporate right, he must shew some title in himself; yet the court of *K. B.* having the supreme superintendence of all corporations, will grant a mandamus *where no particular person is interested.*”

*Case of the town of Nottingham.*  
23 G. 2 Bull.  
N. P. 201.

As where by charter or prescription the corporate body is to consist of a definite number, and they neglect to fill up the vacancies as they happen, the court will grant a mandamus ordering them to do it.

4. “ It should be shewn to the court on the application for a mandamus, *that there has been a default*; for the court will not presume that any officer or other person have not done their duty, unless that is shewn to the court.”

*Rex v. Bor. of St. Ives.*  
Mich. 5 Geo. 3.  
Bull. N. P. 199.

Therefore, where the mandamus was granted to the churchwardens and overseers of the poor, *to make a rate for the relief of the poor*, the court would not grant at the same time a mandamus *to the justices to allow it*; for there could be no default in the justices till the poor rate was made, and presented to them to allow it; and the court would not presume that the justices would not do their duty: though in this case the same justices had refused to allow a rate when a mandamus had issued for the purpose, and had been taken up the term before, on an attachment for disobedience.

*Rex v. Vintners comp.* Mic. 25  
Geo. 2. Bull.  
N. P. 200.

5. “ Where the corporation is by prescription, the party applying for a mandamus must shew the constitution of the corporation, and verify it by affidavit as well as his own right: Where the corporation is by charter, a copy of it must be produced at the time of making the motion.”

6. “ If on the party's shewing the cause before the court, it appears that there was good grounds for his request,  
“ moral

" moved from that office, to which he applies to be restored;  
 " they will not grant a mandamus, even though there appears  
 " to have been some irregularity in the proceeding by which  
 " he was removed."

For where the application was for a mandamus to restore *Rex v. Mayor*  
 one *Roberts* to the place of clerk of the *Bridge-House* estates of London,  
 of the city of *London*, it appeared that he had been reported <sup>2 Term Rep.</sup>  
 a defaulter in his accounts to a considerable amount, by the <sup>177.</sup>  
 city auditors; and that being called to account; and to pro-  
 duce his vouchers, that he wrote a letter to the committee,  
 refusing to comply with their requisition; upon which he was  
 suspended, though *he had not been regularly summoned to make*  
*his defence*, which should have been done; yet the facts above  
 appearing clearly, the court refused a mandamus.

So where a mandamus applied for was to restore a person *Rex v. Mayor*,  
 to the office of town-clerk, the corporation laid before the &c. of *Ar-*  
 court a very full and sufficient cause for removing him, and *bridge.*  
 that he himself had openly declared in court that he would *Cowp. 523.*  
 serve them no longer. The prosecutors counsel admitted,  
 that there was sufficient cause for a motion, but objected,  
 that he had been removed *without notice* to appear and defend  
 himself. *Per* *Ld. Mansfield*, The court will not grant a  
 party the assistance of a prerogative writ, when it is acknow-  
 ledged that the corporation had sufficient cause to remove him,  
 and when they would undoubtedly again remove him the in-  
 stant he was restored.

But where a rule is granted, if on shewing cause it ap- *Rex v.*  
 pears doubtful whether the party has a right or not, yet the *D. Bland.*  
 court will grant a mandamus, in order that the right may *Bull. N. P.*  
 be tried on the return. *200.*  
*Trin. 1741.*

7. Though the court have granted a mandamus for any *Rex v. Wigan,*  
 purpose, yet may they grant another, and concurrent man- *& Rex v.*  
 damus for the same purpose; but such concurrent mandamus *Burghey.*  
*is not of course*, but is only granted where there is reasonable *2 Burr. 782.*  
 ground to suspect that the party who first moved the manda-  
 mus does not really mean to execute it, and then a rule is  
 granted to shew cause.

And where there are such applications for concurrent man- *Rex v.*  
 damuses, the court will order a time for proceeding to an *Halcmere.*  
 election to be inserted in the first mandamus. *Sayer Rep. 106.*  
*Rex v. West*  
*Loce.*

And where there has been a judgment of ouster against *3 Burr. 1386.*  
 a corporate officer, the court will not grant a mandamus to  
 proceed to the election of another, until the four-day rule  
 X x given

## WRITS OF MANDAMUS.

given on the *postea* is out, because *till then judgment cannot be actually signed*; and on such application for a mandamus to proceed to a new election, the prosecutor on the former judgment shall have priority.

8. "The rule to shew cause must always be on the face persons to whom the writ is to be directed, in case the rule should be made absolute."

*Rex v. Church-wardens and overseers of Clerkenwell.*  
3 Geo. 1. Bull.  
N. P. 200.

Therefore, where the rule was on the churchwardens and overseers to shew cause why a mandamus should not go directed to them, and *the twenty principal inhabitants*, it was held to be bad; for these last should have been parties to the rule. But the court gave leave to amend, saying, it would be good on new service.

*Rex v. Bankes.*  
3 Burr. 1453.

And if the mandamus is to proceed to the election of a corporate officer, of which a person is then in possession, he must be made a party to the rule.

## 4. OF THE WRIT.

Under this head is to be considered, 1. The direction of the writ: 2. The body or mandatory part of the writ: 3. The return.

## I. TO WHOM THE WRIT IS TO BE DIRECTED.

1. "A mandamus must regularly be directed to those persons by whose authority the party was deprived of that right, to which he applies to be restored, and who therefore have a power of restoring him."

*Rex v. Mayor, &c. of Derby.*  
Salk. 436.

Therefore, where the mandamus was to the *mayor, aldermen, and capital burgessees of Derby*, commanding them to command *A. and B.* who had removed the party complaining, to restore him, the writ was quashed; for it was absurd that the writ should be directed to *one person to command another to do any act*: It should have been directed to the parties themselves who were to do it.

2. "The writ should be directed to the corporation by its corporate name, where the power of motion resides in the corporation at large."

*Rex v. Mayor, &c. of Rippon.*  
2 Salk. 433.

Therefore where the mandamus was directed to the *mayor, aldermen, and commonalty of Rippon*, and they returned that they were incorporated by the name of the *mayor, burgessees, and commonalty of Rippon*; the court held

held the writ to be bad, it being directed to the corporation by a wrong name.

“ And though the thing to be performed is to be done by only *part* of the corporation, yet may the writ be directed to the corporation at large, though it may also be directed to that part of the corporation who are to do the act required by the mandamus.”

But it must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation, which part are not to do the thing required, the writ shall be quashed. Rex v. Mayor of Abingdon. 2 Salk. 699.

Therefore where a mandamus to admit a person to the office of town-clerk, was directed to the *mayor and aldermen of Hereford*; in fact, the mayor only was to admit; for this fault the writ was quashed; for it would not be known who were to obey the writ, if the direction was insignificant or immaterial. Rex v. Mayor of Hereford. 2 Salk. 701;

So where the mandamus was directed to the mayor, aldermen, and common-council of *Norwich*, to proceed to the election of town-clerk, the court granted a superseades of the writ, it appearing to the court on affidavit, that the right of election was in the mayor and aldermen, and the writ was not directed to *them*, neither was it directed to the corporation by their corporate name. Rex v. Mayor &c of Norwich. 1 Stra. 55.

“ But if the writ includes in its direction the whole corporation, or that part which is to make the return, it shall be good, though there may be some informality in the direction.”

As where it appeared that the power of motion was in the mayor, aldermen, and others of the common-council, the mayor and aldermen being part of the common-council, and the writ was directed to the mayor, aldermen, and common-council, as if excluding them from being part of it, and it was moved to quash the writ for misdirection: But *per Cur.* Here is no one in this direction who must not join in this act; it is only repeating the several constituent parts of the corporation; and mentioning the entire common council after the mayor and aldermen, is only a repetition *quoad* the mayor and aldermen; and therefore the motion was refused. Pecs v. Mayor of Leeds. 1 Stra. 640.

3. “ Where a writ of mandamus is directed to several acting in different capacities, the writ shall be taken *reddendo singula singulis*; that is, that each person shall do that which belongs to his office.”

As where the writ was to the mayor and burgesses of *Tregony*, commanding them, viz. “ *quod eligitis & juratis majorem*, Rex v. Mayor &c. of Tregony. Mod. Caf. 111.

*"majorem, &c. secundum auctoritatem vestram," &c.* It was moved to supercede this writ on the ground that the power of electing was in the burgeses, and that of swearing in the mayor alone; so that the mayor could not make a return of this writ as directed to him to elect, nor the burgeses as directed to them to swear: But the court held, That the writ was to be taken distributively, and that each was to obey the writ according to their several functions.

Rex v. Wigan.  
2 Burr. 784.

4. The court will not specify to whom the mandamus shall be directed, for this might be prejudging the right of the electors; but he who applies must at his peril have it properly directed.

Rex v. Ward.  
2 Stra. 893.  
3 Ref.

The writ need not set out that the person to whom it is directed is the person whose duty it is to do that for which the mandamus is granted (as to swear and admit, *ex. gr.*); for if it is misdirected it should be so returned.

## 2. OF THE BODY, OR MANDATORY PART OF THE WRIT.

1. "The writ must be made out according to the rule upon which it was applied for and granted."

Rex v. Wild-  
man.  
2 Stra. 879.

Therefore where the mandamus was granted, commanding the defendant to deliver *to the company of blacksmiths* all books, papers, &c. which he had in his custody as clerk to the company, from which he had been removed, and the officer took the rule, *to deliver them to a new clerk*; for this variance the writ was superceded, and the party compelled to apply for a new writ.

1 L. Ray 560.  
Bull. N. P. 404.

2. "The writ should contain convenient certainty of the duty required to be done, but need not set forth by what authority that duty exists."

Rex v. Mayor  
and Burgeses of  
Nottingham.  
Sayers Rep. 36.  
Bull. N. P.  
204.  
S C.

As where a mandamus had been granted, wherein it was recited that there ought to be in the town of *Nottingham* a common-council, consisting of twenty-four persons, and commanding the defendants to chuse six persons to fill up the vacancies; upon motion to quash the writ it was objected that *the nature of the right to have such a common-council, that is, whether by charter or prescription, or how, was not set forth with sufficient particularity*: But the objection was over-ruled, many precedents being to the contrary, and a precise form being necessary in a mandamus.

Moore v.  
Mayor of  
Hastings.  
Caf. Temp.  
Hard. 362.

So where the suggestion of the writ was, That the party had a right to be admitted to the office of —, paying a reasonable



reasonable fine, that is sufficient without shewing how, or by whom it is to be assessed.

So where the mandamus was to the defendant, as judge of the prerogative court of *Canterbury*, to grant probate of the will of Lord *Londonderry*, and exception was taken to the writ, that it only set out that the Earl had *bona notabilia* at *Westminster* and divers dioceses; but did not say within the province of *Canterbury*, in which case only the defendant could grant the probate: But the court refused it, saying, that they would not presume an inferior jurisdiction.

Rex v. Dr. Bettesworth.  
2: tra. 857.

3. "It seems that a mandamus can only command the doing of one single act, or be but for one single purpose."

For in this case the court granted a mandamus to the defendant to make a poor's rate, but *refused to order particular persons to be inserted in it*, though there was an affidavit that such persons were rateable, and that they were omitted to prevent their voting for members of parliament; for the validity of the rate might be tried by appeal.

Rex v. Churchwards of Weobly.  
2: Stra. 1259.

So the court granted a mandamus to the mayor to hold a corporate assembly, but refused to add to it, "To admit all persons having a right:" for this involved other questions, and was too complicated, as each person's right was distinct.

Rex v. Mayor of Kingston upon Hull.  
1: Stra. 578.

"But in such case the writ may command several persons acting in their distinct capacities to act officially according to their respective offices."

As where by custom, the court-leet was to present to the steward the person whom the commonalty had chosen to be mayor; the court granted a mandamus to the steward to hold a leet, and to the burgeses to attend at such court, and to present *J. D.* who had been chosen by the commonalty.

Rex v. Borough of Christchurch.  
12 Geo. 2. Bull. N. P. 200.  
Rex v. Midhurst.

5. If the corporation to which the mandamus is sent is above forty miles from *London*, there shall be fifteen days between the teste and return of the first writ: but if but forty miles or under, then but eight days, and the writ should not be tested before it was granted by the court.

1: Willf. 283.  
S. P.  
Called Rex v. Ld. Montague.  
Bull. N. P. 200.

And in such case one day is to be taken exclusive, and the other inclusive.

Anon.  
Salk. 434.  
Rex v. Mayor of Dover  
1: Stra. 107.

### 3. OF THE RETURN.

Writs of mandamus being either to restore or admit, I shall consider distinctly the return to each.

Returns are to be considered, 1. In point of substance: 2. In point of form.

### 1. Of the Return in Point of Substance.

In order to make a return good in this respect, it must appear, 1. That the removal was by persons who had legal power to remove: 2. That the person was removed for good and legal cause: 3d. That the proceedings under which the removal took place were regular.

Of each of these in order.

#### 1. The Amotion must have been made by Persons having lawful Authority to do so.

Bagg's case.

11 Co. 99.

Lord Bruce's case.

2 Stra. 819.

Rex v. Richardson.

1 Burr. 539.

Rex v. Mayor of

Lyme Regis.

Dougl. 144.

It seems to have been long a question in whom the power of amotion resided. Lord Coke in this case lays it down, that this power can only belong to the corporation by charter or prescription. But this doctrine has since been exploded; and it has been solemnly adjudged that there is *incident to every corporation a power of amotion.*

The law therefore now is, That corporations may claim a power of amotion either by charter or prescription; charter may give it to the whole, or to a select body, but if it gives it to neither, the law gives a power of amotion to the whole body at large.

Rex v. Corp. of

Doncaster

Tr. 25 Geo. 2.

Sayer 37.

But a power of amotion can never be exercised by a *part of the corporation*, as the common council, *ex. gr. unless expressly given by charter or prescription.*

#### 2. The Person must be removed for good and Legal Cause.

Good causes of amotion may be in general for misfeasance, or for nonfeasance; that is, for crimes, which render him unfit for the duties of his station; or neglect, such as prevents him from the due discharge of them.

Bagg's case, 11

Co. 99. & per

Lord Mansfield.

1 Burr. 339.

1. Malfeasances or crimes are of three descriptions: First, Such as are infamous in their own nature, but have no relation to his office: as attainder for forgery, perjury, or conspiracy at the King's suit, or for any crime rendering him infamous: But to ground a removal for any of these causes, there must be a previous conviction by indictment in the King's courts: 2. Such crimes as are offences against his oath of office, and duty as a corporator; such as burning or erasing the records of

of the corporation. For this crime he may be tried and convicted by the corporation, and for that removed: 3. Crimes of a mixed nature, such as are both indictable and against his duty as a corporator; as bribery.

Med. Caf. 19,  
100.

Under this general description of offences it is to be observed,

1. "That the offence sufficient to justify the removal of a corporator or corporate officer, must appear to have been done *malò animo*."

For where the recorder of a borough gave wrong advice with regard to corporate proceedings, as it appeared to have been innocently done, it was adjudged to be an insufficient cause of removal. *Rex v. Willis*, 4 Burr. 1999.

2. "As to such crimes whereof a previous conviction is necessary to found the disfranchisement on, it is the infamy of them that renders him an improper person to be continued in an office of trust; therefore, if the crime for which he is convicted, be such as carries no infamy with it, it will be no cause of disfranchisement."

It was therefore held,

That a corporator having become a bankrupt, was in this case adjudged to be an insufficient cause of removal; for bankruptcy is neither a crime in the eye of the law, nor an offence in any light contrary to the duty of a corporator; for which causes only the removal would be lawful. *Rex v. Mayor, &c. of Liverpool*, 2 Burr. 723.

So a conviction for an assault is an insufficient cause; for such is not an offence of an infamous nature. *Rex v. Mayor of Derby*, 2 Geo. 2. Bull. N. P. 206. Carth. 173.

3. "The offence, if not on account of the infamy, must have some respect to the corporation itself; that is, such as is detrimental to the corporation itself or some of its liberties, privileges, or franchises."

Therefore a personal offence from one member to another is not a sufficient ground of disfranchisement: So though rasure of the corporation-books may be a good ground; yet, unless it be in a matter to the detriment of the corporation, it is otherwise: So misemploying the corporation-money is not a sufficient cause of removal, because the corporation may have their action. *Bull. N. P. 208*, *Ibid.*, 2 Raym. 1283.

"So a mere contempt of, or contemptuous words used to the corporation, or any member of it, is not a sufficient ground of amotion."

As where in a mandamus to restore Dr. Bentley, the return of the cause of his amotion was, That being cited to answer a plea *Rex v. Chancellor, &c. of Cambridge*, 1 Stra. 557.

a plea of debt in the Vice-Chancellor's court, he said the process was illegal and unstatutable, and that he would not obey it; that he took the process from the officer, and said the Vice-Chancellor was not his judge, and that he *stulte egit*; for which contempts that he was at a future congregation deprived: The court were of opinion that these causes were insufficient; though a peremptory mandamus to restore him was granted on another ground, viz. that he had not been summoned.

4. "A misbehaviour in one office is no ground to remove a person from another."

2 Raym. 1364. As where the person had misbehaved in the office of *chamberlain*, and he was removed from being a burghess, it was held not sufficient.

1 Lev. 291. 5. "Where an office is held at pleasure, in such case the  
1 Vent. 77, 88. person in possession may be removed without any cause assigned."

Rex v Church- As where the mandamus was to the churchwardens of  
wardens of Thame, to restore *J. Williams* to the office of sexton; they  
Thame. returned, that *Thame* was an ancient parish, and that for time  
1 Stra. 115. immemorial there has been a church; that the sexton was  
Rex v. Mayor eligible by the churchwardens and major part of the inhabi-  
of Canterbury. tants; which person so elected was to continue at the pleasure  
1 Stra. 674. of the electors, and was amoveable by the major part when law-  
fully assembled; that 1 May 1703, *J. Williams* was elected  
sexton, and continued in the office till 31st of June, 1717;  
on which day the churchwardens and parishioners being law-  
fully assembled, that he was removed; the return was ad-  
judged to be good, though no other cause was assigned for his  
removal than the pleasure of the electors,

"But where an officer is so removeable at will, and is re-  
moved by the corporation, if they in their return to a man-  
damus to restore him do not rely on their power, but return  
a cause of removal, if that is insufficient, the court will grant  
a mandamus to restore the person removed."

Rex v. Mayor As where the mandamus was to restore one *Slatford* to the  
of Oxford. office of town-clerk, and the return stated him to be an offi-  
2 Salk. 428. cer at the will of the mayor and aldermen; but that he was  
removed, his office being void for not having taken the oaths  
of allegiance, &c. before them; this being insufficient, as he  
might have taken them before two justices, a mandamus went  
to restore him, though it had been sufficient if they had stated  
that he had been removed, as holding his office at pleasure.

2. Nonfeasance, or neglect of the corporator's duty, is the next legal ground of amotion.

As to this it has been decided,

1. "That to make this a good cause of amoval, it must amount to *an absolute desertion and neglect of all the duties of a corporator*; for an occasional absence for a short time, as for health or urgent business, that shall not be sufficient."

Rex v. Mayor  
of Leicester.  
4 Burr. 2087.

As where the recorder of a borough was absent from *one session*, where his presence was necessary, and where he had no notice to attend; without shewing any further intention of leaving the borough: it was held an insufficient cause to remove him; though non-attendance is otherwise a good ground to remove a recorder, his office being a public one relating to justice,

Rex v. Wells.  
4 Burr. 1999.  
Serj. Whitaker's  
case.  
Salk. 434.

So absence from four occasional great courts, and one on a stated day, was adjudged to be not a sufficient ground for amotion; for a corporator may be innocently absent where he may not think his presence absolutely necessary; and therefore unless he neglects where he has a particular summons and notice, it cannot be construed a desertion of his office.

Rex v. Richardson.  
1 Burr. 317.  
Rex v. Mayor  
and Aldermen  
of Carlisle.  
1 Stra. 385, 386.  
S. P.

2. Non-residence is another species of nonfeasance: but it is only in the case of offices which require a perpetual execution; as mayor, sheriff, coroner, where perpetual residence is necessary: but in other cases local residence is not necessary; as in the case of recorder, freemen, &c. for it would be absurd to say that non-residence merely should be a cause of amoval, where, notwithstanding such non-residence, they may do all their duty requires; though if such persons totally neglect their office and duty, they may be removed.

Rex v. Ponsonby.  
M. 25 Geo. 2.  
Bull. N. P. 206.  
4 Mod. 56.  
Vid. Vaughan  
v. Lewes.  
Carth. 227.

Therefore where the corporator resided three miles from the borough, it was held, That that was not such a desertion of his office as to justify a removal; for he was near enough to attend his corporate duty.

Rex v. Mayor  
of Doncaster.  
Sayer Rep 37.

So that in such case it is not sufficient to shew a non-residence; for unless there be an express clause in the charter, non-residence will not be of itself a cause of amoval, but it would be good in any case to shew such a non-residence as amounts to a total desertion or dereliction of their office.

Rex v. Miles.  
P. 9 G. 1.  
Bull. N. P. 207.

Therefore where a corporator resided 200 miles from the borough, and had been absent for 22 years, this was considered as a total desertion of the duties of his offices, and holden to be a good cause of amoval.

Rex v. Mayor  
of Newcastle.  
Cited Sayer 39.

And

Rex v. Mayor  
&c. Lyme  
Regis.  
Douglass, 144.  
3 Ref.

And where a corporator is removed on the ground of non-residence, it is not necessary for the corporation to give him notice to come and reside before they remove him; for he is bound by his office to reside, and if such is the law, he ought to know it.

### 3. The Proceedings under which the Removal has taken Place, must be regular.

Rex v. Mayor,  
&c. of Liver-  
pool.  
2 Burr. 723.

1. "Where a corporator is to be removed, every individual member of the corporation, or part of the corporation, in whom the power of motion resides, ought to be summoned."

Kynaston v.  
Mayor, &c. of  
Shrewsbury.  
2 Stra. 1051.

Therefore where all the members of the corporation had been summoned, *except one*, whom the bailiff had supposed to have been absent and out of summons, though he had a house and resided within the town, the court resolved, That for this irregularity the removal was clearly bad, as a summons should have gone to every member.

Bull. N. P. 228.  
3 Burr. 2601.

"When it is said, That every member must be summoned, it means every member within summons; that is, resident within the limits of the borough."

Rex v. Mayor,  
&c. of New-  
castle. 2 Geo. 2.  
L. Ray. 226.  
2 Burr. 742.

For if it appears that he lived out of the limits of the borough, it is not necessary to return that he was summoned.

*Quere*, If such summons is necessary where the meeting is on a charter-day?

Rex v. Mayor  
of Doncaster.  
2 Burr. 738.

2. "This notice should contain the particular business; that is, that the motion of a corporator was the business for which they were summoned."

"For though convened on *other business*, they cannot proceed to disfranchise a corporator, unless they have met in pursuance of a notice for the purpose of removing him, even though he himself is present."

Rex v. corp. of  
Carlisle.  
Trin. 6 G. 1.  
1 Stra. 384.  
L. Raym. 1357.  
S. P.

For where on a return to a mandamus, it appeared that the power of moving was in the mayor and aldermen as a select common council: That the whole corporation having been summoned *to elect a recorder*, that after the election was over, that the mayor and aldermen separated from the rest, and removed the prosecutor. This was adjudged to be void, for want of a summons to the common council only, to meet for the purpose in their distinct capacity.

3. " So particular notice must be given to *the party himself* 2 Burr. 731.  
 " who is to be disfranchised, that the assembly mean to pro-  
 " ceed to remove him, in order that he may prepare his de-  
 " fence."

As where a mandamus was granted to restore Dr. Bentley; Rex v. Chancel-  
 the defendant returned, that he had been summoned to answer lor, Master, and  
 in a plea of debt before the Vice-Chancellor's court, and that Scholars of the  
 he had refused obedience, and acted contumaciously, for which University of  
 the congregation removed him; but it appeared that Dr. Cambridge.  
 Bentley had never been summoned to answer before the congrega- 1 Stra. 557.  
 tion; for that omission the court granted a peremptory man-  
 damus to restore him.

But where a corporate officer had declared that he would Rex v. Mayor,  
 serve no longer, and had in other respects misdeameaned himself, and Burgesses  
 though he was removed without notice, the court refused the of Axbridge.  
 writ to restore him, the causes of removal appearing so suffi- Cowp. 532.  
 cient.

So in the case of a mandamus to restore Sir J. Jennings to Rex v. Mayor,  
 the office of alderman, the corporation returned, That at an &c. of Rippom.  
 assembly of the corporation, he came and *personaliter libere &* 2 Salk. 433.  
*debito modo resignavit* his office, declaring he would serve no  
 longer; wherefore they chose another in his room: this was  
 held to be good, though the court further held, That till such  
 election he had power to waive his resignation.

So where the mandamus was to restore Elias Chalk to the Rex v. Mayor  
 place of burgess of Wilton, the defendants returned a custom and Burgesses  
 to remove for misbehaviour, and then set out several instances of Wilton.  
 of misbehaviour; and that *he being therefore fully heard to all* Salk. 428.  
*that was objected in the common council*, that he was turned out;  
 it was objected, That it was not said that he was summoned;  
*sed per Cur.* The end of the summons is, that he may be  
 heard for himself, and therefore where he has been heard, want  
 of summons is no objection.

*Note*, Where the mandamus is to admit, the question turns  
 on the validity of the election; which will be fully considered  
 in the chapter of *Quo Warranto*.

## 2. Of the Return considered in Point of Form.

1st. Who should make the return: 2d. In what manner:  
 3d. The proceedings on the return.

### 1. Who should make the Return.

A mandamus was directed to the mayor, bailiffs, and bur- Rex v. Mayor,  
 gesses of the town of Abingdon; the mayor made a return, &c. of Abing-  
 don.  
 and Salk. 431.

*Rex v. Mayor, &c. of Norwich.*  
Balk. 432. S. P.  
and brought it into the crown-office, intending to move to have it filed; and a motion was made to stay the filing of it on a suggestion, that this return was made by the mayor and the minor part of the corporation against the consent of the majority, who would have obeyed the writ: but *per Holt*, Where a writ is directed to a single officer, as a sheriff, and a stranger makes a return without his privity, he may at any time that term wherein the writ is returned, come in and disavow it; but not after the term: (*Dyer* 182.) But in this case, where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, the court will not upon affidavits examine whether there was the consent of the majority: The return must be received, and a remedy lies against the mayor; and if the return is falsified, a peremptory mandamus must go.

## 2. In what manner the Return is to be made.

*Per Ld. Mansfield.*  
2 Bur. 731.

1. "The return to a mandamus should set out all necessary facts precisely, to shew the person removed in a legal and proper manner, and for a legal cause: It is not sufficient to set out *conclusions* only; the *facts* must be precisely set out, that the court may judge of the matter. So it is the same as to the *cause* of the motion, that must be likewise set out."

*Rex v. Mayor, Bailiffs and Burgesses of Liverpool.*  
2 Burr 723.

Therefore where to a mandamus to restore one *Joseph Clegg* to the place of common council-man of *Liverpool*; the defendants returned generally the cause of the motion, by the common council, who were *in due manner met and assembled*: The court held the return to be bad; for that they were *not* duly assembled was a conclusion of law; they should have set out the facts, viz. That *they had as a select body the power of motion*: That *the members were summoned by regular and proper notice*: And that *Clegg himself was also regularly summoned and heard in his defence*.

*Rex v. Mayor and Aldermen of Doncaster.*  
Sayer Rep. 37.  
1 Rcf. Dougl.  
144. S. P.

So if the motion has been by a *part of the corporation*, the return should shew *how they have such authority, whether by charter or prescription*; for as the power of motion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it; that is, whether by charter or prescription.

1 Ld. Raym.  
1564.

2. "Therefore a return in *too general terms* is bad: As to say that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without saying what these rules and orders were."



So a general return of removal for *neglect of duty* has been held to be bad, without stating *the particular instances of neglect and omission*, that the court may judge of its sufficiency. *Rex v. Mayor and Aldermen of Doncaster.* Sayer Rep. 37. 3 Ref.

So where the mandamus was to restore *A.* to the place of schoolmaster of the grammar school of *Morpeth*, and the defendants returned, That at the time of publishing the act *primo* of his Majesty's reign, that *A.* was under schoolmaster, and that he never took the oaths by the act appointed; *ratione cuius* he became incapable, and that therefore they could not restore him: This return was held to be bad, as being in too general terms; it should have said that he did not take the oaths of supremacy, allegiance, and abjuration, and such as are required by a schoolmaster; for he is not obliged to take the *Scotch* oath: so there is an exception of officers in the fleet, &c. It therefore should appear that he was not excepted: *for the party having no opportunity to plead in this case, the return ought to be certain to every intent.* *Rex v. Ballivos de Morpeth.* 1 Stra. 58. Show. 365.

3. The return must answer to the material part of the writ, not to the words only; for if it be false in substance, though true in words, an action will lie. *Braithwaite's case.* 1 Vent. 19.

4. "The return to a mandamus may contain *any number of concurrent and consistent causes*, to shew why the party should not be admitted or restored."

As where the mandamus was to admit the plaintiff to the place of freeman of *Morpeth*; the return was, 1st, That he was not duly elected: 2d, That by the custom of the borough, no person could be admitted as a freeman, unless he was approved of by the lord of the manor or borough, and that the plaintiff was not so approved; objection was taken to this return, that it was double: but it was nevertheless held good, and that the officer might return any number of good and consistent causes. *Wright v. Fawcett.* 4 Burr. 2041.

"But the causes must be consistent."

Therefore where the mandamus was to restore a person to the office of sexton; the return was, 1st, That he was not duly elected: 2d, That there was a custom in the inhabitants to remove at pleasure, and that they had so removed him pursuant to the custom: It was objected to this, that the causes were inconsistent; that he was not duly elected, and yet that he was regularly turned out: But the court held the causes to be consistent: for as he was in possession *de facto*, they might justify the removal either on the ground that he was not duly elected, or if he was so, that they had a right to remove him at their pleasure. *Rex v. Churchwardens of Taunton, St. James.* Cowp. 413.

But

**Regina v.  
Mayor and  
Aldermen of  
Norwich.**  
2 Salk. 436.

But where the mandamus was to admit one *Dunch* to the place of alderman of *Norwich*; the defendants returned, That when a person is elected alderman by the ward, the court of aldermen may refuse him: That *Dunch* was so chosen alderman by the ward, but they refused to admit him, because he had not received the sacrament within the year; that he was turbulent and factious, and procured his election by bribery; and *quod non fuit electus*. The court agreed that several causes might be returned, but that they must be consistent, which here they were not; for when *Dunch* was chosen by the ward it was an election, before approbation by the aldermen; the return first admits this election and avoids it, and yet at last they return that there was no election, which is repugnant.

**Rex v. Mayor,  
&c. of Cam-  
bridge.**  
2 Term Rep.  
456.

But if a return to a mandamus consists of several independent matters not inconsistent with each other, but some good in law and some bad, the court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest.

**Rex v. Mayor,  
&c. of Oxford.**  
Salk. 428.

5. If the mandamus is to restore the person applying to an office held at pleasure, and the defendants who have power of removal do not return it, but return that the removal is for a misdemeanor or such cause, and the court find that cause so returned insufficient in law, they will not refer the removal to the power the defendants may have to remove at libitum; but take it that the removal was for the cause returned, and grant a peremptory mandamus.

**Rex v. Mayor,  
&c. of Coven-  
try.**  
Salk. 430.

And where the corporation have such power to remove at their pleasure they must return it positively, and not by way of recital.

6. "If the supposal of the writ is wrong, as in mis-stating the constitution of the corporation, the return must deny this supposal of the writ, and it will not be sufficient to state it truly in the return."

**Rex v. Bailiffs  
and Burgeffes  
of Malden.**  
Salk. 431.

Therefore where a mandamus issued to the defendants reciting, That whereas they ought to chuse yearly two bailiffs out of such as had not been bailiffs for three years before, *ideo* they were commanded to chuse; they returned their constitution by letters patent to be to chuse two from among the aldermen, and that they had chosen two according to the form and effect of the letters patent generally; this was held bad; for they ought to deny their constitution to be as mentioned in the writ, or shew a compliance with the writ; whereas they have added according to a constitution set forth in the return different from the

*the writ, and yet have not denied the supposal of the writ; so a peremptory mandamus was granted.*

So if the writ is directed to the corporation *by a wrong name*, they should return the matter specially and rely on it; but if they make a return, they admit themselves to be the corporation to whom the writ was directed, and cannot afterwards avail themselves of the misnomer. Rex v. Bailiffs, &c. of Ipswich, 2 Salk. 434.

7. Clerical mistakes in the returns to writs of mandamus may be amended after the filing of the return, Rex v. Lyme Regis, Dougl. 130.

8. Where the mandamus is by writ out of chancery, no attachment lies for not returning it till the pluries issues; but where the mandamus is out of the King's Bench, the first writ ought to be returned; but an attachment is never granted without a peremptory rule to return the writ. Mayor of Coventry's case, Salk. 423.

And if the corporation to which the mandamus is sent be above forty miles from London, there must be fifteen days between the teste and return; but if it is but forty miles or under, but eight days only. Anon. 2 Salk. 434.

9. The return need not be under the seal of the corporation, nor signed by the mayor; but if an action is brought against the mayor for a false return, proof of the delivery of the writ to him and of the return made, will be sufficient. 2 Ld. Raym. 148. 1 Ld. Raym. 223.

### 3. Of the Proceedings on the Return.

These proceedings are either at common law, or under the statute 9 of *Ann.*

#### 1. Of the proceedings at common law.

1. This was by *action on the case for a false return*; and where the return is made by several, the action may be either joint or several, for it is founded on a tort; but it must not be against any of those who voted against the return, but who were over-ruled by the majority; for the action lies against the individuals, though the return is made in the name of the corporation. Bagg's case, 11 Co. Carth. 171. 1 Ld. Raym. 564.

And where the mandamus was directed to the two bailiffs, one was for obeying the writ, the other would not, nor join in the return; the court granted an attachment against both, saying, It would be endless to try in all cases which was right; and it would always be used as an handle to delay. Rex v. Bailiffs of Bridgworth, 2 Stra. 808. 1 Ld. Raym. 125.

But if they made no return, an attachment would issue.

#### 2. Where:

2 Stra. 805.

2. Where several have joined in an application for a mandamus, they should all join in an action for a false return.

Carth. 228.

Sir Peter  
Rich v.  
Filkington,  
Lord Mayor  
of London.

6 Mod. 152.

S. P.  
Buckley v.  
Palmer.

2 Salk. 430.

And where in case for a false return, the plaintiff set out his election as on the 1st of *October*; proof that he was chosen the 29th of *September* was held to support the declaration, for the day was but form.

3. Where an action was brought for a false return, and the plaintiff had a verdict, so that the return was falsified, the court always granted a peremptory mandamus; but the plaintiff could not move for a peremptory mandamus till the four days after the return of the *postea*, because the defendant had till then to move in arrest of judgment.

Anon.

3alk. 428.

But where the action had been brought in the common pleas, and the plaintiff had a verdict, and then moved in *K. B.* for a peremptory mandamus, the court refused it; for *per Holt*, the mandamus recites *prout patet recordum*, which cannot be here, as we cannot take notice of the records of the common pleas.

## 5. OF THE PROCEEDINGS UNDER THE STATUTE 9 ANN.

By this stat. 9 *Ann.* c. 20. it is enacted, "That where any person has been deprived of his freedom, or of any corporate office to which he was entitled, or refused admission thereto, where a mandamus had so issued, and a return made thereto, that it should be lawful for the persons suing the mandamus to plead to or traverse all or any of the material facts contained in the return; to which the persons making the return may plead, take issue, or demur, and the proceedings be had as in an action on the case, and the issue be tried in the same manner; and if a verdict shall be found for the persons suing out the mandamus, or they have judgment on demurrer, or *nil dicit*, or in any manner; that in such case the party so succeeding shall have damages, costs, and a peremptory mandamus: but if the persons making the return have judgment, they shall in like manner have their costs."

Under this statute it has been held,

Rex v. Church-  
wardens and  
Overseers of  
Salop.  
Bull. N. P. 201.

1. That as the first writ of mandamus always concludes with commanding obedience or cause to be shewn to the contrary; that if a return is made to it, which on the face of it appears to be insufficient, the court will grant a peremptory mandamus;

mandamus; and if that be not obeyed, a peremptory mandamus shall issue against the persons disobeying it.

And where the mandamus is directed to the corporation to Bull. N. P. *ibid.* do a corporate act, and no return is made, the attachment is only granted against particular *persons* who refuse obedience to it; but where it is directed to several persons in their natural capacities, there an attachment shall go against all: but when they are before the court their punishment will be proportioned to the offence of each.

And where no particular person is interested in the false re- Rex v. Mayor, turn, the court may nevertheless grant *an information* against &c. of Nottingham Hill. 25 Geo. 2. the persons who made it; but the return must be filed and allowed before the information can be moved for. Bull. N. P. 203.

2. Where the return to a mandamus is traversed and tried, Kynaston v. but at the trial the jury omit to find damages, whereby there Mayor, &c. of Shrewsbury. can be no judgment for costs, this cannot be supplied by a writ of enquiry; but the plaintiff may have an action for a false return. 2 Stra. 1052.

## CHAPTER II.

Of Informations in the Nature of  
*Quo Warranto*.

**I**NFORMATIONS in the nature of *Quo Warranto* are granted by the court of *King's Bench*, for the purpose of trying the rights of persons to any corporate or other franchise into which they have intruded, for the purpose of removing them.

In treating of this proceeding, I shall first consider what intrusion into corporate or other franchises shall be deemed a proper subject for an information in nature of *quo warranto*: 2dly, The proceedings to obtain it, and the rules laid down by the court in granting.

## I. WHAT INTRUSIONS INTO CORPORATE OFFICES ARE OBJECTS OF INFORMATIONS, QUO WARRANTO.

1. Intrusions into corporations are, 1st, Where the person was ineligible: 2dly, Where the election of the person has been irregular, informal, or contrary to law: 3dly, When made under a bye-law: 4thly, Where the election has been held before a person without authority: 5thly, Where the office becomes void by any subsequent matter.

## 1st. Of Elections void for Ineligibility of the Person.

Rex v. Carter.  
Cowp. 220.

1. As where the defendant had been elected a burghess of *Portsmouth* at five years old, though he was not sworn into the office till he was the age of twenty-one, yet was he deprived by information *quo warranto*, the court being clearly of opinion *That an infant was ineligible to such a corporate franchise*.

2. By stat. 13 Car. 2. it is enacted, "That no person shall be chosen to any corporate office who has *not taken the sacrament within a twelvemonth preceding the election*; and in default of so doing, the election shall be void."

This

This statute is not only addressed to the elected, and a prohibition upon them; but is a prohibition to the electors, if they have notice: The legislature has commanded them not to chuse a non-conformist; because he ought not to be trusted. Both by the statute therefore and authorities, the election is void: And the statute 5 Geo. 1. Ch. 6. § 3. applies only to persons in actual possession, and was made to quiet such possession, if no legal remedy was pursued within a certain time.

Per Ld. Ch. J. Wilmot. *Harrison v. Evans*. cit. Cowp. 535. *Rex v. Monday*. Cowp. 535 and recognized per Ld. Mansfield. S. C. Cowp. 517.

## 2. Of Elections void for Irregularity.

1. "Where the mode of election is directed by the charter, that must be followed, or the election shall be void."

It will therefore be necessary to consider the several constructions on different charters which have come before the court.

1. In this case by the charter, the election of the mayor was ordered to be made by the mayor and the burgesses, or the majority of them: it was adjudged on this, That in order to a good election there must be a majority in number of the corporation actually assembled, by whom the election must be made; and therefore where the corporation consisted of the mayor and eleven burgesses, and four only met and elected the mayor, that this election was void, such not being a majority of the subsisting burgesses.

*Rex v. Grimes*. 5 Burr. 259<sup>2</sup>.

And so if the major part of the corporation was dead, it has been held that the corporation would have been dissolved, or at least that those who survived could not have proceeded to a new election. But where the words give the election to a majority of the members for the time being, it will be different.

*Rex v. Rees & Rex v. Newsham* Pasch. 1775. Cited per Aston Just. Cowp. 537.

2. "Where the charter of the borough of Malden ordered the election of an alderman to be by the bailiffs and head burgesses, or the major part of them;" there were two bailiffs; both were present when the defendant was elected, but one of them was afterwards ousted on an information *quo warranto*; it was resolved, That by the words of the charter, the bailiffs were an integral part of the corporation without whom no valid act could be done, and that the presence of both was necessary; that by the judgment of ouster against one of them, that the directions of the statute were not complied with, for the election was then before one only; and so there was judgment for the King.

*Rex v. Smart*. 4 Burr. 2241.

Sir Robert Solist.  
bury Cotton v.  
Davies.  
1 Stra. 53.

3. The borough of *Denbigh* consists of two bailiffs, two aldermen, and twenty-five capital burgesses, and the election of the capital burgesses is ordered to be by the bailiffs, aldermen, and capital burgesses for the time being, or a majority of them, of which one bailiff and one alderman must be two; it was adjudged, That the statute only required the presence of one bailiff and one alderman, but gave them no negative vote, so that a person might be elected, though they both voted against him.

Foot v. Prowse,  
Mayor of  
Truro.  
1 Stra. 625.

In the borough of *Truro* the mayor is to be chosen out of the aldermen *annuatim eligend.* the fact at the trial was, that the aldermen present at the defendant's election had been in several years, and none of them had been re-elected within a year; it was held that *annuatim eligend.* was only directory, and that an annual election of them was not necessary to make an election in their presence good: and Ch. Just. King, who delivered the opinion of the court, compared it to the case of constables and other annual officers, who are good officers after the year is out until others are elected and sworn.

6. How far the granting of a new charter shall affect the corporate proceedings, is proper here to be taken notice of.

Rex v. Palsmore.  
3 Term Rep.  
199.

When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act, the corporation is dissolved, and the crown may grant a new charter; as in this of the borough of *Higham*, of which corporation only one alderman and seven burgesses remained; and no mayor could be elected, or any aldermen chosen, nor could the burgesses either by usage, prescription, or charter hold any corporate assembly; the court were of opinion, That the corporation was dissolved, and that new letters patent granting them a new charter, to be valid.

Comb. 316.

If a corporation refuse a new charter it is void, but if they accept and put it in execution, it is good; and whether a corporation have accepted a new charter or not, is matter of evidence, not of law; and proof of acting under it is proof of acceptance.

Vent. 355.  
4 Co. 87.

By accepting a new charter, granting new rights, or changing a new name of incorporation, without a surrender of the old charter, the corporation will not lose any of their franchises.



By the charter of *Hen. 4. Norwich* was made a county, and to have two sheriffs to be chosen by the commonalty. *Rex v. Larwood, Salk. 167.*  
*Char. 2.* by charter confirmed their former charter, but granted further, that one sheriff should be chosen by the mayor, sheriffs, and aldermen only. *Per Holt Ch. Just.* The King cannot resume an interest he has already granted, unless the grantees concur; the corporation might have used this as a new grant or confirmation; and having made the election in question according to it, it is evidence of their intention to accept it as a grant.

In a *quo warranto* against the defendant, as mayor of *Bed-* *Rex v. Phillips.*  
*sey*, he claimed under a charter 5 *Ediz.* whereby a power was *1 Salk. 394.*  
 given to him to hold over the office of mayor till another was chosen; but it appearing that by a subsequent charter 36 *Ediz.* the mode of election was altered, and all former modes of election abolished, though the words were, abolishing the modes *eligendi, nominandi & appointuandi* the mayor; this was held to abolish the right of holding over, though it said nothing of abolishing the mode *tenandi* the office.

The proclamation made by *James I.* in the fourth year of *Newling v. Francis.*  
 his reign, for restoring such corporations to their ancient charters as had surrendered them to *Charles II.* (but which *3 Term Rep. 189.*  
 surrenders were not intolled) shall operate as a grant of revival of such charters (if accepted) and restore them.

I shall now proceed to other informalities, by which elections may be avoided.

2. "Where the election has been by the body corporate, *but not corporately assembled by previous summons,* such election is void, unless the whole elective body be present and consented."

As where the whole common council (who were the electors) *except one,* met at a public-house to drink, when they were acquainted that *W.* had resigned, upon which it was proposed to chuse the plaintiff, which was objected to by two or three: however, he was sworn in: This was holden not to be a good election, on the grounds above. *Sir Charles Musgrave v. Nevinston. 2 Ld. Raym. 1358. 1 Str. & C 584.*

So where upon evidence it appeared that the corporation met upon a particular day (pursuant to a bye-law) for the election of a mayor, it was holden that they could not proceed to the election of an alderman for want of summons, there being no custom to warrant it. *2 Ld. Raym. 1355.*

So all the members individually should be summoned to attend the election: but if any of them are not within summons, *Rex v. Grimes. 5 Burr. 2598.*

summons, as not resident within the borough, such person need not be summoned.

Per Ld. Mansfield.  
2 Burr. 2682.

3. "So where there is any *usual mode of giving notice* of an election, that mode cannot be dispensed with, nor can the election be good without complying with it, unless all the persons who have a right are actually summoned and unanimously agree."

Rex v. May.  
Rex v. Little.  
Freemen of  
Saltash.  
3 Burr. 5681.

As where the *usual place* of corporate elections was the Guildhall, and the *usual notice* was by ringing a bell at eight, nine, and ten o'clock on the morning of the election: the election of the defendants was not at the Guildhall, but at an inn; was upon a bye day, and there was no notice by ringing of the bell; but all the electors intitled to notice had personal notice of this meeting at the inn, and of the business to be there transacted; the court concurred in the doctrine above delivered by Lord Mansfield.

4. "Where a number are to be elected, they should be put up singly, and the sense of the electors taken upon each."

Rex v. Monday.  
Cowp. 530.

For where the mayor and four aldermen met to elect seven burgessees, the mayor and one alderman gave in a list of seven, and the three aldermen a list of seven also; but of these last some were ineligible; and the election was declared to fall on the seven given in by the mayor, one of whom was the defendant: this election was adjudged to be void, first, because the several persons had not been put up singly: 2dly, It being contended, that as part of the aldermen's list had been incapacitated, the three votes given to them must be deemed as absolutely thrown away; and that as it was not in the power even of the majority present to prevent the election, that part of the mayor's list must be held to be elected, and that the election must be deemed to fall on the defendant: but it was resolved, That the mayor's list being entire, it was impossible to say that any individual of them was elected; and so the election was void as to all.

"It is said in the last case that when a corporate assembly is convened, it is not in the power of any part of the members to stop the election; on which point the following decision took place:"

Oldknow v.  
Wainwright.  
Rex v. Foxcroft.  
4 Burr. 1017.

As where the question was, whether the defendant or one Seagrave was duly elected to the place of town-clerk of Nottingham: the case was, That all the electors, in number twenty-five, were regularly summoned, twenty-one met; the mayor put up Seagrave, and no other person was put in nomination; nine of the twenty-one voted for Seagrave, but twelve

twelve did not vote at all, and eleven of them protested against any election being then held, the office being then, as they alleged, full of Foxcroft, whose right was then contesting in *K. B.* and there was a written protest to that effect, and signed by ten of them, the eleventh declaring that he suspended doing any thing; the mayor declared *Seagrave* duly elected, and swore him in accordingly: the court were of opinion, That after the corporation was duly summoned, that the election must be proceeded on, and that the only way to prevent the election from falling on any particular person was by voting for another, that this here had not been done, that the mere protest was of no avail, and so confirmed the election of *Seagrave*.

5. "Where the election has been in pursuance of stat. 11 *Geo.* 2. the directions of the statute must be pursued, or the person is removeable by *quo warranto*."

For where no election had been had of the bailiffs of *Malden* on the charter-day, and on the day following by virtue of the stat. 11 *Geo.* 2. divers of the then aldermen and head-burgesles, in whom the right of election was, met for the purpose of the election; at which meeting the defendant *Malden* (he being an alderman) did preside, he was elected, and at the meeting took the oaths of office before *Jonas Malden, William Smart, and John Edwich, being three other senior aldermen of the borough*, and was therefore admitted bailiff of the same: this election was adjudged to be void, on the ground that, by the words of the statute, the person elected is to take the oaths before the officer who shall preside at the election, which not having been complied with, that the election was void.

6. "Where the officer or corporator elected is to be sworn in before any officer of the corporation, there must be his assent to the swearing: it is not sufficient that it was done in his presence."

For where by the charter of *New Romney*, the mayor is to be sworn in before his predecessor; at the election there were two candidates, *Ellis* and *Whitchurch*: *Ellis* had the majority, notwithstanding which the mayor ordered *Whitchurch* to be sworn; upon which the town-clerk read the oath; and both *Ellis* and *Whitchurch* put their hands on the book and kissed it; it was ruled, That this was not a good swearing by *Ellis*, it being without the assent of the mayor.

And though an officer has been legally elected, yet if the swearing in has not been regular, he shall be removed by *quo warranto*; for the swearing in is as necessary to a complete investment of his office as the election.

### 3. Of Elections void for Illegality of the Bye-Law, under which the Election has been held.

If the defendant in an information *quo warranto* justifies under a bye-law, the validity of that bye-law decides the validity of the election; it will be therefore to be inquired, What bye-laws are good?

1. "Where the corporation is by charter, they cannot make bye-laws to restrain the number of those by whom the election is to be made by charter."

*Rex v. Catbush.* 4 Burr. 2204. As where the charter of *Maidstone*, the corporation was directed to consist of a mayor, thirteen jurats, and forty common council, who should have a power of making bye-laws; and it is directed by the charter, That the election of the common council should be by the mayor, jurats, and commonalty; a bye-law limiting the election to be by the mayor, jurats, and sixty of the senior common freemen, was adjudged to be a bad bye-law; for there was no power to make a bye-law depriving a part of those intitled to vote under the charter in the election of the common council from exercising the right.

*Rex v. Head & al. freemen of Helston* 4 Burr. 2515. So where the power of making bye-laws was in the mayor and aldermen under the charter, which also settled the power of electing the burgesses to be in the mayor, aldermen, and commonalty: a bye-law restraining the election of the burgesses to the mayor and aldermen only is bad, though declared to be made with the assent of the commonalty; for the bye-law could not take away the right of election which was in the body at large under the charter, and the assent of the commonalty is of no avail, as they had under the charter nothing to do with the making of bye-laws for the borough.

2. "And on the same principle, a bye-law cannot narrow the number of persons out of whom an election is to be made; as for example, by requiring a qualification required by the charter."

*Rex v. Spencer.* 3 Burr. 1827. As where the election of the common council was in the mayor, jurats, and commonalty: a bye-law limiting it to the mayor, jurats, and to such of the common freemen who should have served for one year the offices of churchwarden or overseer of the poor, was held to be bad, as not warranted by the charter.

3. " But where the power of making bye-laws is in the body Per Lord Mansfield.  
 " at large, they may delegate their rights to a select body, 3 Burr. 1241.  
 " who so become the representative of the whole com-  
 " munity."

And where by charter or prescription the mode of electing of- Newling v. Francis.  
 ficers is not regulated, a power resides in the corporation to 3 Term Rep. 187.  
 make bye-laws for their own regulation with respect to the  
 elections.

" And where a good bye-law is so made and adopted, the  
 " election must be made in pursuance of it, or the election  
 " will be bad."

As where by the charter of *Macclesfield*, the mayor is to Barber v. Boulton.  
 be chosen out of the capital burgesses, by the capital burgesses, 1 Str. 114.  
 who are twenty-four in number: it was found that the usage  
 had been for above fifty years preceding, for the common  
 burgesses to put in nomination five of the capital burgesses,  
 out of which the capital burgesses chose the mayor, and that  
 this usage was by virtue of a bye-law, not now extant in writ-  
 ing: in this case the common burgesses put eight in nomina-  
 tion, out of which the mayor was elected; the court agreed  
 that the bye-law and usage was good, but that the election  
 was void, for it had neither pursued the bye-law nor the di-  
 rections of the charter.

4. " Bye-laws made under the foregoing restrictions, and  
 " whose object is to avoid confusion, and to provide for the  
 " better government of the corporation, are good."

For where on a mandamus to admit the plaintiff to the Green v. May- place of freeman of the fraternity of free-masons of Durham, or of Durham.  
 the defendant returned, That by a bye-law made by the cor- 1 Burr. 128.  
 poration it had been ordered, that every person to be admitted  
 to the freedom of the city should be called at three several  
 meetings of the mayor, aldermen, and wardens of the sever-  
 al companies, which meetings were held on stated days, and  
 be there approved of; and that the plaintiff was not so called  
 and approved of, and therefore could not be admitted; this  
 bye-law was adjudged to be good.

So where a bye-law was made by the corporation of fur- Rex v. Corporation of  
 geons, That no one should be admitted to the freedom of Barber- Surgeons.  
 their corporation unless he understood Latin, was adjudged to 2 Bur. 892.  
 be good.

#### 4. Of Elections void, as being made before Improper Officers.

*Rex v. Smart.*  
4 Burr. 2241.  
ante. 1. By the charter the election was to be held before the two bailiffs, both in fact presided at the election, but judgment of ouster was afterwards had against one of them; this, it was held, destroyed the election.

*Rex v. Nat. Dawes.*  
4 Burr. 2277. 2. But if an information *quo warranto* is brought against a corporator, with a view of disfranchising those whose title depends upon his, he shall not be allowed by collusion with the prosecutor to let judgment go against him by default, for if the other corporators, whose right depend on his, apply to be admitted to defend, the court will permit them on indemnifying him.

*Rex v. Grimes.*  
5 Burr. 2598.  
5 Ref. 3. In an information *quo warranto*, impeaching a title on the ground of judgment of ouster against the returning officer; the judgment is admissible, but not conclusive evidence against the corporator.

#### 5. Of Elections void, by Matter subsequent.

*Rex v. Goodwin.*  
Doug. 383.  
a. 22. 1. "If a person is in possession of a corporate office, and elected to another, the duties of which are incompatible with those of the former, the appointment to the latter office is equivalent to an amotion; and if the party continues to exercise it, he may be removed by an information *quo warranto*."

*Rex v. Pateman.*  
3 Term Rep. 777. For where an information was moved for against the defendant, to shew cause why he claimed to be an *alderman of Bedford*, he having been elected to the office of *town-clerk*; it appeared that the town-clerk's accounts are allowed by the aldermen, and that he was a ministerial officer attending on the corporate courts and meetings, under the controul and direction of the aldermen; the court held, This made the offices incompatible, and granted the information.

*Milwood v. Thatcher.*  
2 Term Rep. 80. So where the defendant was a jurat of *Hoslings*, and he was elected to the place of town-clerk, and it appeared that the office of the jurat was judicial, and that of the town-clerk ministerial in the same court, they were adjudged to be incompatible.

*Rex v. Trelawney.*  
3 Burr. 5615. But in this case it was decided, That the defendant who was steward of *West Looe* (an higher office as was alledged) being elected a capital burghers, That that did not avoid either office; for they were compatible.

2. "Where

2. "Where the admission of corporators is by the stamp-acts ordered to be on stamps, there must be an admission for each regularly stamped."

For where the defendant's admission appeared to be, together with five others, written on one stamped admission, but five others blank stamped sheets of admission were annexed to it, the admission was adjudged to be void. *Rex v. Reekes*, 2 Stra. 716.

## 2. OF THE PROCEEDINGS BEFORE THE COURT OF K. B. IN GRANTING INFORMATIONS QUO WARRANTO.

Under this head I shall consider, 1st, The mode of application to the court: 2dly, The rules laid down by the court granting informations of this nature: 3dly, The proceedings on the part of the defendant, and on the part of the crown: 4thly, Of the costs.

### 1. Of the Mode of Application to the Court of King's Bench.

"1. It is enacted by stat. 9 Ann. 20. "That where any person shall usurp any corporate franchise or office, that it shall be lawful for the proper officer, with leave of the court, to exhibit an information *quo warranto* against him, at the relation of any person desiring it who shall be named therein, and on this the court shall proceed; and if the rights of many may be determined, the court may give leave to consolidate them." *Rex v. Collingwood & al.* 1 Burr. 573.

2. "And if the persons against whom the informations have been filed are found guilty of such usurpation, the court shall give judgment of ouster against them, and fine them, and also give costs to the relator: but if the defendant has judgment, he shall have costs."

But no information *quo warranto* can be granted against any corporation, as a body, for any usurpation on the crown, except in the name of the Attorney-General. *Rex v. Carmarshen.* 2 Burr. 869.

The practice therefore under this statute, is to move for a rule to shew cause why an information in the nature of *quo warranto* should not be granted, &c. grounded on an affidavit, stating the usurpation; which rule must be served on the party, and on the return of it, the court exercise their discretion. *Hawk. P. C.* 162.

And

Rex v. Brown.  
Eaft. 29 G. 3.  
quot 3. Term  
Rep. 574.

And the requisitions of the statute are so positive, that the court cannot dispense with them, though the application is by a stranger to the corporation.

## 2. Of the Rules laid down by the Court of K. B. in granting Informations Quo Warranto.

1. "The court will not grant an information *quo warranto* against a person exercising a corporate franchise, to which he has been legally elected, though he has committed an offence which might amount to a forfeiture, *until he has been removed by the corporation.*"

Rex v. Heaven.  
2 Term Rep.  
777.

For where the defendant was an alderman of Bedford, but had thirteen years before removed from the borough, and not resided in it afterwards, and it was sworn to be the usage of the borough, that every alderman removing from it, and not residing therein, forfeited his office; the court refused the application for an information *quo warranto* against him, *the corporation not having removed him.*

Rex v. Stacey.  
1 Term Rep. 1.

2. "It is made a *quære* in this case, whether in any case a derivative title can be impeached where the person from whom it was derived died in possession of his office undisturbed: But it is decided, That such title shall not be impeached by those who have acquiesced, and acted under it: and Justice Blackstone was of opinion, That a derivative title could not be so impeached, in any case where the party was dead under whom the defendant claimed."

Rex v. Spear-  
ing.  
Lent Ass. Win-  
chester, 1771.  
quot. 1 Term  
Rep. 4.

For where the defendant derived his title under the Duke of Bolton, as mayor of Winchester, it was contended that the duke was not legally mayor, he not being an inhabitant at the time he was chosen, and so was not eligible; the duke was dead, and Justice Blackstone would not suffer them to go into evidence, whether he had been legally chosen or not, but whether he had been *de facto* mayor; which it appeared he had by the corporation-books.

Rex v. Bond.  
2 Term Rep.  
767.

3. Where the party relator stands in the same circumstances with the defendant against whom he applies for a *quo warranto*, or where granting the information may ~~off~~ franchise so many as may endanger the dissolution of the corporation, the court will exercise their discretion, and refuse the information.

Rex v. Mort-  
lock.  
3 Term Rep.  
300.

4. In a rule for an information against the defendant, the objection to his election was, that his election was on the same day



day he was proposed, whereas it should be on the following, under a bye-law made in 1766; in answer to this it was shewn, that the relator was party to an agreement by the corporation not to enforce this bye-law, and that if any one's title was impeached, who had been elected under it, that it should be defended at the public expence; the court rejected the application on those grounds.

5. The titles of persons who are *de facto* members of a corporation, admitted, sworn, &c. in the actual enjoyment of their offices, cannot be impeached upon the trial of a person elected by them. *Per Lord Mansfield. Cowp. 509.*

“ But where there is no other mode by which the title of the electors can be questioned in the first instance, the rule does not apply; and the court will grant an information against the elected.”

As was this case, which was rule for an information *quo warranto* to shew cause by what title the defendant claimed to be *parson* of the borough of *Fowey*, and setting out the right of election to be in the *Prime's* tenants duly admitted, and stating that twenty-two out of fifty persons sworn of the borough, who had presented the defendant for *portreeve*, had been improperly admitted; though this was impeaching their titles through that of the defendant, the court granted the information. *Rex v. Mein. 3 Term Rep. 595.*

6. The court will not grant an information *quo warranto* on the application of a person who was present at, and concurred in the defendant's election; but if many join in the application, and one of them has not concurred in the election, if he will avow himself the relator, the court will grant the information. *Rex v. Stacey. 1 Term Rep. 1. Rex v. Symmons. 4 Term Rep. 223.*

But this is not the case where the disability avoiding the election is a *latent one*; for where the application was on the ground that the defendant *had not taken the sacrament within a year before his election*, as required by stat. 13 Car. stat. 2 ch. 3. and it was opposed, on the ground that the persons applying had concurred in the defendant's election; the court held, That that objection held only where the relator concurred in the election, knowing of the defect; but that this was latent, an omission of an act required to be done by every person elected to an office, and not known at the time of the election. *Rex v. Smith. 3 Term Rep. 573.*

7. On an information *quo warranto* against the defendants, to shew by what authority they acted as burgesses, having never been admitted; the only *alibi* offered was voting at the election for members of parliament: the court would not grant the rule, saying, that as they claimed a right to vote, that

that that was only properly inquirable before the House of Commons.

Cafe of the Borough of Horsham.  
Hil. 30 G. 3.  
quot. 3 Term  
Rep. 599.

But in this case, it is said that it had been often ruled, That an information *quo warranto* would lie against a person claiming to have a right to vote by virtue of a burgage tenure.

Rex v. Williams.  
1 Stra. 677.

8. On an application for an information *quo warranto* against the defendant, for not having taken the oaths of supremacy and allegiance, and made on the application of the town-clerk, who swore he had not administered them, though he made an entry stating that he had; the court refused the application, as it would be a dangerous consequence to allow a town-clerk to disqualify members on his own oath, contrary to the record.

Rex v. Newling.  
3 Term Rep.  
310.

So where the application was, stating that the relator *believed* that the defendant was not duly sworn, and the affidavits on the other side *did not swear that he had been duly sworn in*, but only *stated that he appeared from the books to have been duly sworn in*; the court refused the application.

Winchelsea's cases in Burr.  
Rep. passim.  
Rex v. Dickin.  
4 Term Rep.  
282.

9. It was formerly settled as a rule by the court of *King's Bench*, never to allow an information *quo warranto* to go against a person who had been twenty years in possession of his corporate franchise; but the court had established it as a rule, That no information *quo warranto* should go where the party had been six years in possession; and that is now confirmed by statute.

It is enacted by stat. 32 Geo. 3. c. 58. 1. "That to any information *quo warranto*, the defendant may plead that he has held the office or franchise for six years preceding the information, and such shall be a complete bar. 2. A title derived under any election shall not be impeached by reason of any defect of title of the person or persons electing, if such person or persons were in possession *de facto* of his or their franchise or office, six years before the filing of the information. 3. The officer having the custody of the corporation-books, must permit the inspection of them at all times."

10. As to the affidavits upon which the court are to decide, it has been decided,

Rex v. Mein.  
3 Term Rep.  
496.

That if the relator's affidavit is defective in stating a material fact, but that fact is afterwards stated in the defendant's affidavit; the court may use the latter affidavit in support of the prosecutor's application, as where the relator's affidavit omitted to state the mode of election, but which was done by the defendant.

### 3. Of the Proceedings on the Part of the Defendant, and on the Part of the Crown.

1. On the return of the rule, the defendant may shew cause. *Hawk. P. C.* why the information should not go against him, and these are <sup>162.</sup> good causes, that the right had been already determined by mandamus; that it has been acquiesced in for many years; that the defendant's right depends upon those who voted for him, which are then undetermined; that the franchise is of a private nature; or he may disclaim that he ever acted under his election, for there must be a user as well as claim, in order to subject the party to an information *quo warranto*; for the judgment is, that he be fined *pro usu & usurpatione*. *Rex v. Ponsonby. M. 25 G. 2. Bull. N. P. 211.*

2. In civil actions the plaintiff can only recover by the strength of his own title, but the defendant in *quo warranto* informations is bound to shew a good title in himself against the crown, or judgment will go against him; therefore where the defendant claimed, by two titles, prescription and charter, but relied on the first, which was found against him, though it was contended for him, that he might have a good title under the second, yet the court gave judgment of ouster against him; for the crown may take issue on any matter that may shew the defendant to have usurped the franchise; and if one material issue be found for the crown, it shall have judgment. *Rex v. Leigh. 4 Burr. 2143. Rex v. Latham, & alt. 3 Burr. 1485.*

“ And where the defendant relies on a title in a particular form, he must prove it as laid.”

For where the defendant made title to his admission of freeman of *Fowey*, on the presentation of *twenty-three* homagers free tenants of the borough and manor, and on issue taken on that, it was found that *but two of them were of that description*, the issue was held to be found for the crown, the plea being falsified. *Rex v. Mein. 4 Term Rep. 481.*

3. The defendant's plea should set out his title at length, and conclude with a general traverse of *absq. hoc. quod præd. &c. usurpavit, &c.* and the crown should not take issue upon the general traverse, but reply to the special matter; for so the defendant knows how to apply his defence. *Rex v. Blagden. Gilb. Rep. 145.*

### 4. Of the Costs.

“ The statute 9 *Ann. (ante)* is confined to cases of “ usurpations of corporate offices or franchises, and there-  
“ fore

"fore where the information is at common law, there can  
 "only be judgment of ouster; but the court cannot give  
 "costs."

Rex v. Wil-  
 liams.

1 Burr. 402.

Therefore where the information against the defendant was  
*"for holding a court within the borough of Dentside, which  
 should only be held by the bailiffs, of which he was not one,"*  
 and there was judgment against him; the court held, That  
 the relator could not have his costs, for this was not an assump-  
 tion within the statute of *stat.*

## PART THE THIRD.

### Of Evidence.

**I**N treating of the law of evidence, I shall first consider the nature of evidence in general: Secondly, The rules adopted by the court in receiving it.

#### 1. OF THE NATURE OF EVIDENCE IN GENERAL.

Evidence is twofold: 1st. Evidence *viva voce*, given by a witness in court, or unwritten evidence: 2d. Written evidence; as deeds, instruments in writing, &c.

##### 1. OF VIVA VOCE EVIDENCE.

Under this head I shall consider, 1. Who may be witnesses: 2. How *viva voce* evidence is to be given.

##### 1. WHO MAY BE WITNESSES.

Every person is by law entitled to be a witness, unless excluded by law for the following incapacities: 1. On account of interest: 2. On account of standing in some relation to the parties in the cause: 3. On account of crimes which destroy his credit: 4. On account of want of discretion. Co. Litt. 6.

#### 1. Of Witnesses excluded on Account of Interest.

1. The strict notion of objection to a witness, on the ground of interest, is upon the *voire dire*, whether he be to gain or lose by the event of the cause; for a direct interest in the event is a decisive objection to his competence.

As in the case of an informer on a penal statute, in which case the same person cannot be informer and witness, because he is entitled to a part of the penalty, and so is interested in the event. Rex v. Tilly.  
1 Stra. 316.

" And that shall be deemed equally an interest which empts the witness from a charge or loss which he may incur on the event of the suit, as much as the prospect of positive advantage."

*Hopkins v. Neal.* 2 Stra. 1026. Therefore a *prochein ami*, by whom an infant sues, cannot be a witness in the cause, for he is liable to the costs; and accordingly in this case he was rejected by *Ld. Hardwicke*.

Per Buller Just. 1 Term Rep. 164. So in the case of bail, they cannot be witnesses for their principal, because they are directly and immediately interested; for if a verdict be against the principal, they become immediately liable.

2. " But the interest to render a witness incompetent, must be a certain benefit or advantage arising to him from the event of the cause, or a certain charge or loss to which he may be liable."

*G. & S. v. Treves.* 1 P. Wm. 287, 290. Therefore it was decided by Lord Cowper, that a grantee, when he appeared to be a bare trustee, was a good evidence to prove the execution of the deed to himself; for a naked trust shall not exclude a man from being a witness; and though in such cases it is usual to get a release from the trustee, yet it is not necessary; for in fact such person has no interest to release.

" So that a future or contingent interest, or a future and contingent loss, which he may derive or suffer from the event of the cause, shall not render him incompetent."

*Smith v. Blackham,* Salk. 283. Therefore it was adjudged in this case, that an heir apparent might be a witness to prove the title of lands, but that a remainder-man could not; for this last had a vested interest, but the heirship was a mere contingency.

*Carter v. Pierce.* 1 Term Rep. 163. So where in an action against a defendant *administratrix*, the co-obligor in the bond to the ordinary was called as a witness for her; he was objected to, on the ground that he might be liable himself on his bond to the ordinary; but the objection was over-ruled; for the bare possibility that he might be liable in an action on a certain event, was no objection to his competency.

*Goodtitle lessee of Fowler v. Welford.* Dougl. 134. So where to prove the sanity of the testator the executor was called as a witness, and objected to, on the ground that he was interested in supporting the will; as in case it was set aside he would be liable as executor *de son tort*; in this was held to be no objection to an executor, who took no other beneficial interest: *tamen quare*, If the interest of the executor in the residuum undisposed of the testator's personal estate is not a sufficient objection, until disproved by evidence, or that he renounces: *Vid. post.*

For on an indictment for forging a seaman's will, a *person* named executor in a subsequent will was held an inadmissible witness to prove that the name of the testator subscribed to the first will was a forgery; for that went to establish the second will, in which he was named executor.

Rhodes's case.  
Leach Cr. Cas.  
25.

"And on the same footing, where the interest is very remote, it shall not disqualify the witness."

For where in trover for three *South Sea* bonds, the case was, That Ball delivered them to Lechmere a broker to sell; he lost them; but having given notice at the *South Sea-house*, they were stopped by the clerk, on being brought there by Bostock to receive the interest: Bostock brought trover for them against the clerk, and Lechmere was called as a witness to prove the property; but it appearing that he had given a bond to indemnify the company, he was rejected by C. J. King on the ground of interest, as being liable to the costs: Bostock recovered in that action, and then Ball brought an action against him; and Lechmere being called as a witness, was objected to, because that if Ball should recover against Bostock, that would be set in equity against the former recovery by Bostock against the clerk of the *South Sea-house*: But the Chief Justice said, that was too remote to exclude him from being a witness, and went only to his credit; so his testimony was admitted.

Ball v Bostock.  
1 Stra. 575.

So where on a *scire facias* to avoid a patent, an exception was taken to a witness, because he was deputy to the persons who would avoid it; the exception was disallowed, because the suit here was between the King and the patentee.

Owen Hanning's case,  
1 Mod. 21.

3. "Though the witness may not have any interest in the cause wherein he is called as a witness, yet if in its event he may be ultimately benefitted, he shall be inadmissible."

As *ex. gr.* if both party and witness claim any matter under the same title or in the same right; or if the determination of the cause depending, may perhaps prevent a suit against the witness.

As in actions upon policies of insurance, one underwriter cannot be a witness for another whose name is on the policy. This is so laid down in the 1 T. R. but *Vid. S. C. 4 Burr* 2255, where it is said that it was decided, That the objection went only to the credit, not to the competency of the witness. *Bent v. Baker*, 3 T. Rep. 27. & post 714.

East India Com.  
v. Gosling.  
M. 16 G. 2 cit.  
1 Term Rep.  
303.

So where the two defendants were part owners of a ship, of which the plaintiff was husband, and appointed to that office by a deed executed by all the owners, by which deed they

French v.  
Blackhouse.  
Same v.  
Foulston.  
5 Burr. 2727.

they empowered him to expend money generally for the use of the ship; he insured for all the owners, and brought separate actions against two of them: they were each of them charged for the amount of the whole sum. On the trial of the first action, the defendant in the other action was called as a witness; Lord Mansfield rejected him as incompetent; and on a motion for a new trial, the court concurred with him.

Corporation of  
Carpenters, &c.  
of Shrewsbury  
v. Hayward  
Dougl. 359.

So where the action was against the defendant for following a trade against the custom of the town of *Shrewsbury*, without being free of one of the companies, the plaintiffs in this action; a witness was called, to prove that he had worked in *Shrewsbury* without being so admitted a member of any of the companies, and so to disprove the existence of the custom: he was held to be an inadmissible witness; for though not immediately interested in the event of the suit, yet by the company's failing in establishing the custom, he and others who had been guilty of a breach of it, would be discharged from actions to which they were liable.

On this principle the tenant in possession is no evidence for his landlord in ejectment. (*Ante*, fol. 448.)

1 Sem. 658.

So where the question is respecting the rights of lords of customary manors, the lords of other customary manors are inadmissible witnesses, because the question concerns a general right.

Per Buller Just.  
1 Term Rep.  
302.

The case of commoners comes within the rule now mentioned; as to whom it is laid down generally, that one commoner cannot be a witness for another; but the admissibility of their testimony seems better founded on this rule: If the issue be on the right of common, which depends on a custom pervading the whole manor, the evidence of the commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent one brought by that witness to try the same right: but the reason does not hold where the common is claimed by prescription in right of a particular estate; because it does not follow, that if *A.* has a prescriptive right of common belonging to his estate, that *B.* who has another estate in the same manor shall have the same right; neither would the judgment for *A.* be evidence for *B.*

Bull. N. P. 289. But it is no good exception to a witness, that he has common *pur cause de voisinage* of the lands in question; for this is no interest but an excuse of a trespass.

Rex v. Proffer. But it may be considered as an exception to this rule, the admission of a person liable to be rated, but not actually rated, in



is a question on an appeal, respecting a poor's rate; for such person is a good witness, though he may be ultimately benefited by extending the rate to others. Perhaps it is on the ground that it is *uncertain* whether he will receive the benefit or not, as *per* *Ld. Kenyon* in this case: The poor's rates are made for a short space of time only; and persons who are liable to be rated one month, may not be so the next.

The first case in which the question occurred was before *Per Buller* Just. Baron *Burford* at *Salisbury*, in which on an action in a penal Statute, which gave part of the penalty to the poor of the parish; a person was called as a witness, who was liable to be rated to the poor, but was not rated; he was objected to, but the Judge over-ruled the objection, holding *liability to be rated to be no objection*. 4 Term Rep. 20.

4. "If a witness *thinks himself interested*; that is, that a benefit will arise to him from his testimony, though in strictness of law he has *no right* to such benefit, he should not be admitted as a witness."

As where *A.* having money of the plaintiff's in his hands, *Fotheringham* lost it at play, the plaintiff brought his action on the *stat.* *v. Greenwood.* of *Ann*, against the winner, and produced *A.* as a witness; upon a *voire dire*, he confessed, that if the plaintiff recovered, he was not to be answerable; but if he failed, that the money was to be deducted out of his fortune in the plaintiff's hands. *Per Pratt, C. J.* Though the recovery in this action will not sink the demand against *A.* for the money he has embezzled, yet as in his apprehension, the plaintiff will not trouble him for it in case he recovers, it is a bias on him; and if he thinks himself interested he ought not to be sworn. 1 Stra. 129.

In the same case Serjeant *Darnall* mentioned the case of a *libid.* Mr. *Chapman* of *Bucks*, who owning himself to be under an honorary, though not a binding obligation to pay the costs of the action in which he was produced as a witness; *Parker C. J.* on solemn debate rejected him.

5. "The interest which amounts to a disqualification must, it seems, mean the obtaining of some profit bettering the witness's condition or estate; *not the interest arising from establishing an higher character, or exculpating himself from a charge of misconduct or neglect.*"

Therefore where in an action on a policy of insurance, *Taylor v. Woodness.* with warranty to depart with convoy, in which the plaintiff was nonsuited, the ship having neglected to obey the signals made for joining the convoy, in consequence of which she *Sittings G. Hall.* *Hill. 4 G. 3.* *MISS.* had

had been captured; some imputation was attempted to be thrown on the captain of the convoy: he was called then as a witness and objected to, on the ground that he was interested to support his own conduct; but Lord *Mansfield* over-ruled the objection, saying, that he had often done so before.

Per L. Manf.  
field.  
1 Term Rep.  
300.

6. "No person who has signed a paper or deed shall be permitted to give testimony to invalidate it: for every man who is party to any instrument gives a credit to it, and by such means he might discharge himself. And this is the case though he has no *immediate interest* in the event of the suit in which he is called."

Walton Att.  
of Sutton v.  
Shelley.  
1 Term Rep.  
Rex v. Rhodes.  
2 Stra. 728. S.P.

Therefore where in debt on a bond the defendant pleaded usury: it was proved, that the bond had been given in consideration of the delivering up two promissory notes, which had been indorsed to *Sutton* the bankrupt, and one of the indorsers on which was a person of the name of *Davenport Sedley*; to prove that the consideration of the notes was usurious, the defendant called *Davenport Sedley*: but he was rejected as an incompetent witness, on the ground that he came to impeach an instrument on which his name appeared: though it was admitted, that in point of interest he had none, or that it was rather against his interest; as if the bond was established, the notes upon which his name appeared were at an end.

"But where a person is uninterested in the immediate question; that is, at all events liable himself, he may be called to impeach that instrument upon which his name appears, *as between other parties*."

Levi v. Effex.  
Sittings Westm.  
Mich. 1775.  
MSS.

Therefore where the plaintiff declared as an indorsee of a promissory note drawn by *Foster Charlton*, payable to the defendant, dated the 13th of June 1775; the defendant insisted, that the date of the note had been altered from the 3d to the 13th; and to prove it, called *Foster Charlton*; Lord *Mansfield* admitted him, as at all events he was liable to pay the note.

"But though the law is laid down generally by Lord *Mansfield* (*supra*) That no person shall be admitted to give a testimony to invalidate any instrument which he has signed; yet in the same case Justice *Buller* confines it only to *negotiable instruments*; and this distinction is recognized by Lord *Kenyon*, 3 Term Rep. 34; in which his Lordship mentions as an instance, that witnesses may be called to give evidence against their own attestation, the case of *Jolliffe's will* (*Low v. Jolliffe*, 1 Black. Rep. 365); and so one witness has been allowed to prove the execution

4 Burr. 2235.

" execution of a will attested by three witnesses, which the other two have denied. So that to negotiable instruments only the rule must be confined."

" So neither shall a person be allowed to give a testimony as to the illegality of a transaction, in which a personal trust or confidence has been placed in him."

Therefore where to debt on a bond the defendant pleaded the stat. 5, 6. *Edw. 6.* against the sale of offices, and upon the trial, the person who had been entrusted to make the bargain, and to keep it secret, was called as a witness to give an account for what the bond was given; Lord *Holt* refused to admit him, it being to abuse and betray his trust. *Holt v. Tyrrell*, Pasch. 3 G. 1. B. R. at bar. Bull. N. P. 284.

7. " On the same principle, in no case can the plaintiff or defendant be a witness in his own cause, as he is most immediately interested; therefore an answer in equity is of very little weight where there are no proofs in the cause to back it; but if there be but one witness against a defendant's answer, the court will direct a trial at law to try the credibility of the witness; and in such case will order the defendant's answer to be read to the jury." Bull. N. P. 285. *Alan v. Jordan*, 1 Ver. 161. 3 Chanc. Caf. 123. S. P.

Neither can they be witnesses for or against each other.

But if a material witness for the plaintiff be made by mistake a defendant, the court will, on motion, give leave to omit him, and strike his name out of the record even after issue joined; for the plaintiff can in no case examine a defendant, even though nothing be proved against him. 1 Sid. 441. Bull. N. P. 285.

Therefore where on an information for a misdemeanor, trover, the Attorney General would have examined a defendant as a witness for the King, the court refused to admit him; he then entered a *noli prosequi*, and then examined him. *Vid Casgrove v. Hill*, ante 319. Bull. N. P. ibid.

So where two were indicted for an assault, and one submitted, and was fined one shilling, the C. J. admitted him as a witness for the other. *Rex v. Fletcher*, 1 Stra. 533.

But if any person be arbitrarily made a defendant, in order to prevent his testimony, it is said, that if there is no evidence against him, he may be sworn and examined as a witness: but *quære*, If there should not be a verdict taken for him, as it is said before, that a defendant cannot be a witness on either side: and in this case it is said, that if a material witness for the defendant in ejectment be made a defendant, *Dormer v. Fortescue*, Mich. 9 Geo. 2. that Bull. N. P. 285.

that the right way is for him to let judgment go by default; for if he pleads, and by that means admits himself to be tenant in possession, the court will not on motion afterwards strike out his name; but in such case, if he consents to let judgment go against him *for so much as he is in possession of*, there seems no reason why he should not be admitted as a witness for another defendant,

“ If an action is brought against one defendant for a cause of action *simul cum* others, those persons may be witnesses for the defendant; but *aliter*, where they have been made parties to the suit.”

*Poplet v. James.* In trespass the defendant pleaded *actio non &c.* for that *Richard Mawson* named in the *simul cum*, paid the plaintiff a guinea in satisfaction; on issue thereon, the defendant produced *Mawson*, and *Ch. Just. Eyre* admitted him as a good witness; for what he was to prove could not be given in evidence in another action, and in effect he was making himself liable by swearing he was concerned in the trespass.

*Reason v. Ewbank.*  
Hill. 1 G. 1.  
per Bur. Just.  
&c. Str. 19.  
Bull. N. P.  
186.

But it was decided in this case, that if the plaintiff could prove the persons named in the *simul cum* in the trespass guilty, and parties to the suit, which must be by producing the original or process against them, or proving an ineffectual endeavour to arrest them, or that the process was lost, the defendant in that case cannot have the benefit of their testimony.

8. But though interest is thus a complete objection to the competence of a witness, yet it is to be taken with some exceptions.

9. In criminal prosecutions a party interested may be a witness.

It was formerly held, That where a party liable to a civil cause of action preferred an indictment for the same cause of action, in order to defeat it, that such person was an incompetent witness.

*Rex v. Whiting.*  
Sulk. 123.  
Mich. 10 W. 3

And accordingly, in an information for a cheat, the case was that the defendant had a promise of a note for 5l. from his mother-in-law, but by some sleight got her hand to one for 100l.; it was ruled by *Ch. Just. Holt*, That the mother-in-law could not be a witness, being concerned in the event of the suit, for that if sued on the note for 100l. a conviction of the defendant on this indictment would influence the jury, though the conviction could not be given in evidence before them.

So in an indictment for perjury in an answer in the exchequer, by which the defendant swore that a note on which he had sued the plaintiff was to be put in suit, and that there was no agreement by which he bound himself not to sue the plaintiff, who had filed an injunction-bill in the exchequer on that ground: Lord Hardwicke Chief Justice, refused to allow the plaintiff to be a witness.

Rex v. Nunez.  
2 Stra. 1043.  
Pas 9 Geo. 2.  
Rex v. Ellis.  
2 Stra. 1104.

But since these cases, great light has been thrown upon the distinction between interest which affects the competency of a witness, and influence which only goes to his credit. In the case of *Rex v. Bray, Hill*. 1736, Lord Hardwicke shook the authority of the *King v. Whiting*, and that of the *King v. Nunez*, which he himself had decided; and afterwards, in the case of the *King v. Broughton*, 2 *Stra.* 1229; *C. J. Lee* over-ruled the cases of *Rex v. Whiting*, *Rex v. Nunez*, and *Rex v. Ellis*, above cited.

Per Ld. Mansfield.  
4 Burr. 2255.

The rule therefore as laid down by Lord Mansfield, was,  
“ That the question in a criminal prosecution being the same  
“ with a civil cause in which the witness was interested, went  
“ generally to his credit, unless the judgment in the prosecution where he was a witness could be given in evidence in  
“ a cause in which he was interested :” in which case, I conclude he would be incompetent.

Therefore an action on an usurious contract, to prove the usury, the borrower of the money was called: after having proved the usury, he was objected to as incompetent, unless the repayment of the money was proved, and that he was not competent to prove the repayment of it; but it was resolved, That he was a competent witness to prove payment of the money borrowed; for what he swore in this action, nor the recovery, could not be evidence in an action of debt for the money; and it was also held, That he was competent to prove the usurious transaction, though it would be liable to a different consideration, if the defendant could produce the security, or prove the debt unpaid.

Abrahams *q. t.*  
v. Burn.  
4 Burr. 2257.  
Shank *q. t. v.*  
Payne.  
1 *Stra.* 633.  
Contra.

“ But though it is said that in the *King v. Bray, supra*, it  
“ was first held, That a person interested was admissible as a  
“ witness, yet that seems not correct; for in many cases before that time, a person interested was admitted as a witness in cases of necessity.”

For where in an indictment for a cheat done to *J. S.* by imposing upon him a quantity of beer, mixed with vinegar and grounds of coffee, for port wine; *Ch. Just. Holt* allowed *J. S.* to be a witness to the fact on the trial; for that in such private transactions nobody else could be a witness to the circumstances of the fact but he who suffered.

Rex v. Mac  
karnay.  
Salk. 286.  
Mich. 2 Ann.

Rex v. Molfe.  
1 Stra. 595.  
Trin. 10 G. 2.

So on an indictment for tearing a note, whereby the defendant promised to pay *A. B.* so much; *A. B.* was produced as a witness; he was objected to on the ground that he was swearing to set up his own demand, because that if the defendant was convicted, the court would compel him to give a new note; but *Ch. Just. Pratt* admitted him.

Per Holt.  
7 Mod. 119.

So in this case it was said by *C. J. Holt*, That if a woman give a bond or note to a man to procure her the love of *J. S.* by some spell or charm: that on an indictment for a cheat, she shall be a witness, though it goes to invalidate and destroy the bond or note; for the nature of the transaction admits as other evidence.

2. "A second description of persons interested who are legal witnesses, are those *who by statute* are declared to be so, notwithstanding the interest: or those whom the policy of statutes giving them an interest requires to be so admitted."

1. As by stat. 27 G. 3. c. 29. "It is enacted, That in actions on penal statutes, *inhabitants of any place or parish* are good witnesses to prove the offence, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed twenty pounds."

2. The inhabitants of the county at large being bound to repair bridges except where any person is obliged to repair *ratione tenuræ*, in which case the inhabitants of the county could not be witnesses on indictments for not repairing them; it was therefore enacted by statute 1 Ann. 18. "That on all such indictments, either in the courts at *Westminster*, or at the *Quarter Sessions*, the evidence of the inhabitants, being credible persons of the town, corporation, county, or riding in which such decayed bridges or highways leading to them lie, should be taken and admitted in all such cases."

3. By stat. 8 G. 2. c. 16. s. 15. it is recited, "That no person inhabiting within the hundred could be admitted as a witness for or on behalf of the said hundred on actions brought against them on the statute of *Winton*; it therefore enacts, that all such persons may be witnesses in such actions."

4. By stat. 3 & 4 W. 3. c. 11. it is enacted, "That in all actions brought in the courts at *Westminster*, or at the *assizes* for money mis-spent, or taken by the church-wardens or overseers of the poor, that the evidence of the *parishioners*, others than such as take alms, shall be taken and admitted."

5. On an indictment for perjury, if the indictment is at <sup>2</sup> Hawk. P. C. common law, the party injured may be a witness (*ante*) but <sup>453</sup> where the indictment is *on the statute* the party injured cannot, *for the statute gives him 10l.*

6. But the law has admitted many persons to be witnesses, whom interest might otherwise incapacitate, as in cases of offences, for which a *reward* is given; as statute 4 & 5 W. 3. c. 8. for apprehending highwaymen; 5 Ann. 31. for apprehending burglars, &c. notwithstanding which the prosecutors and persons apprehending those guilty of these offences, are good witnesses on the indictments against them.

So where the indictment was against a *Roman Catholic* <sup>Rex v. Dylone.</sup> priest for assisting in celebrating mass: the prosecutor was <sup>Sitt. West. Tr.</sup> produced as a witness, but was objected to, a reward being <sup>7 Geo. 3.</sup> given to any person who shall convict a Popish bishop or <sup>Onslow N. P.</sup> priest of that offence: but Lord *Mansfield* over-ruled the <sup>257.</sup> objection, and said it was the constant practice to admit the prosecutors on an indictment for a highway robbery or burglary, though they are entitled to the reward.

3. "A third case in which a party interested may be a witness is *from necessity*, where no other evidence can reasonably be expected to be had."

As in an action on the statute of *Winton* against the <sup>Bull. N. P.</sup> hundred, the person robbed may be himself a witness. *Vid.* 289. Preamble, § 15. stat. 8 G. 2. c. 16. *ante* 712.

So the party escaping may be a witness to charge the gaoler <sup>Rex v. Ford.</sup> with an escape; for it is a matter privately transacted between <sup>3 Salk. 690.</sup> the party and the officer, of which there could be no other evidence.

So where the question was, whether the defendants had <sup>Rex v. Phipps</sup> a right to be freemen? though it appeared there were com- <sup>& Archer,</sup> mons belonging to the freemen, yet an alderman was ad- <sup>Cambr.</sup> mitted to prove them no freemen, it appearing that none <sup>Per Lee, C. J.</sup> but aldermen were privy to the transactions of the corpora- <sup>Bull. N. P.</sup> tion respecting the making persons free. <sup>289.</sup>

So where the question was, whether the master had de- <sup>East India</sup> serted the ship *Sussex*, without sufficient necessity? a sailor <sup>Company v.</sup> who had given bond to the master (as a trustee for the com- <sup>Gosling.</sup> pany) not to desert the ship during the voyage, was admitted <sup>16 Geo. 2.</sup> an evidence for the master; it appearing that all the sailors <sup>Bull. N. P.</sup> had entered into such bonds. <sup>289.</sup>

So where a son having a general authority from his father <sup>Anon.</sup> to receive money, received a sum of money belonging to his <sup>Salk. 289.</sup> father, and gave it to the defendant: in trover for it by the father,

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father, the son was held to be a good witness by *C. J. Hol*, his testimony being corroborated by other circumstances.

4. "A fourth case in which a witness interested may be admitted to give his evidence is grounded on the usage of trade, and the usual mode of business."

*Bull. N. P.*  
289.

As a porter shall be an evidence to prove the delivery of goods; a banker's clerk the payment of money.

*Martin v.*  
*Horrell.*  
1 *Str.* 647.

So where a banker's clerk had overpaid a bill, on *assumpsit* brought for the money by the banker, the clerk was *ex necessitate*, and from the usage of trade admitted as a witness, though in case the money had not been recovered, he must have made it good.

*Dixon v.*  
*Cowper.*  
3 *Will.* 10.

So a factor who made the agreement was held to be a good witness to prove the delivery of goods according to agreement, though he was to have a shilling in the pound; for he was a mere go-between, and so might be a witness for either party.

5. "A fifth case in which an interested person may be a witness, is where the party has become interested by his own act, after the party who calls him as a witness has a right to his evidence."

*Pent v. Baker.*  
3 *Term Rep.*  
27.

As where in *assumpsit* on a policy of insurance, the defendant (the underwriter) produced one *Bowden* as a witness, he had been the broker employed by the plaintiff to get the policy effected, and after it had been so underwritten by the defendant, he underwrote it himself; on this ground he was objected to (*ante* fol. 705); but he was nevertheless held to be a competent witness; for having been employed as broker, from the nature of his situation he was the best witness that could be of the transactions; and therefore he should not be allowed to deprive the parties of the benefit of his testimony by any act of his own; particularly as so by collusion with the assured, by putting his name on the policy, he might defraud the other underwriters, by depriving them of the benefit of his testimony to facts which might avoid the policy.

*Barlow v.*  
*Vowell.*  
*Skin.* 586.

So if a person be a witness of a wager, upon which an action is brought; if he has laid a wager on the same matter at the same time, he is not admissible as a witness; but if the wager was laid by the witness afterwards, he is a good witness.

*Rex v. Fox.*  
1 *Str.* 652.

So on an indictment for an assault, it was proved that the prosecutor had laid a wager that he would convict the defendant, he was held to be a good witness, though it went to his credit.



6. "A party interested may be a witness where his interest is very remote or trifling."

As in the cases (*ante* fol. 705.)

So in this case, which was an information *quo warranto*, Rex v. Mayor of London, 2 Lev. 231. Tamen quære if this case be law. Bull. N. P. 290. 2 Vern. 317. for taking one penny per chaldron on all coals brought into London; the defendants prescribed for the duty; freemen were admitted to prove the prescription, it appearing that all the profits went to the mayor and sheriffs, though they had it for the benefit of the corporation of which the freemen are all members; yet they having an interest so small and so remote, were held to be admissible witnesses.

"So if the interest is trifling."

On an information *quo warranto* against the defendant as mayor of Tintagel, issue was joined on this custom, viz. That a court-leet, annually holden on the 10th of October, the mayor for the year ensuing is to be chosen, and for that purpose two elizors are to be nominated, one by the mayor, the other by the town-clerk; these elizors are to nominate twelve jurors, who are to present the mayor for the year ensuing, and in case the town-clerk refuse to nominate his elizor, that then the mayor may nominate the second elizor; the town-clerk did not nominate, upon which the mayor nominated P. Hoskins: this man, and another, who had served as a juror, were offered as witnesses at the trial to prove the custom, but rejected *in toto* as incompetent: but per Lord Hardwicke, on a motion for a new trial which was granted, The having an elizor is intended as a franchise in the borough; but in the elizor himself it is only an authority, and the execution of it past and over. He said he knew no case where a man who has acted under a bare authority has been refused to prove the execution of it: persons who have been themselves in office are often called to shew what the usage is, what they did when in office; and yet, if their acts are not legal, they are liable to informations *quo warranto*. Rex v. Bray. Hill. 10 G. 2. Bull. N. P. 290. Rex v. Robins. 2 Stra. 9069. S. C. Semblement.

And in the last case, *Ld. Hardwicke* recognized this case as good law, viz. that in an issue to try whether by the custom of the manor, the tenants were to pay fines to the heir or successors of the lord during his minority, and be re-admitted upon the death of the last admitting lord, the steward was admitted to prove the custom, though he had seen on the admission. Champion v. Atkinson. 3 Keb. 90.

So a person who had sold an estate without any covenant for good title or warranty, was allowed to be a witness, to prove the title of the vendee. 1 Stra. 445.

7. "And

7. "And lastly, However a person may be interested, if before he gives his testimony he parts with his interest by a release or otherwise, he is restored to his competency."

Oxendon v.  
Pearice,  
2 Salk. 691.

As a legatee is a good witness *against* a will, for he swears against his own interest, which he parts with by impeaching the will.

1 Burr. 423.

So a legatee by a *release* is a good witness to establish a will.

Bent v. Baker.  
3 Term Rep.  
27.

So in this case (*ante* fol. 714) where the broker who had also underwritten the policy, was called as a witness, and was objected to on the ground, first, That he *expected to be called on for part of the expence of defending the action, in which he was called as a witness*; and secondly, That he had joined the defendant and the other underwriters in a bill in the exchequer for a discovery of matters respecting the policy, and for avoiding the same, which bill was then depending, and to the expences of which he was liable; it was adjudged, *That the defendant executing to him a release of all costs at law and equity, paying the plaintiff his costs at law and equity, and procuring the bill in equity to be dismissed, restored him completely to his competence.*

Goodtitle lessee  
of Fowler v.  
Welford.  
Doug. 134.  
Lowe v.  
Jolliffe.  
1 Black. Rep.  
365. S. P.

So where in ejectment by a devisee under a will, one *Hearle* who was named executor in the will, and was also devisee of a reversionary interest expectant on an estate for life, in some copyhold lands part of the estate devised, was called as a witness on the part of the plaintiff to prove the sanity of the testator, which was impeached by the defendant; to obviate the objection of interest, *he had surrendered his estate in the lands to the use of the heir at law, but he had refused to accept it: it was resolved, that by parting with his interest his competency was restored, nor should the heir, by refusing to accept the surrender, deprive others of the benefit of his testimony.*

Masters q. t.  
v. Drayton.  
2 Term Rep.  
496.

But in this case, in an action *qui tam* for usury against the defendant, who was assignee of *Lightfoot* a bankrupt; *Lightfoot* was called as a witness: On his *voire dire*, he confessed that he had not obtained his certificate, nor repaid the money, but that the defendant had proved the debt under his commission; *Lightfoot* offered a release of all claim of allowance, surplus, &c. to his assignees, but he was nevertheless rejected as incompetent; for, notwithstanding the release, the defendant might still arrest him for the whole debt at law.

2. Of Persons inadmissible as Witnesses from Situation, as standing in some Relation to the Parties in the Cause.

These are, 1. Counsel and attorneys: 2. Husband and wife.

1. How far Counsel and Attorneys may be Witnesses.

1. Counsel and attorneys ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; *and this is the privilege of the client, not of the counsel or attorney; for it is contrary to the policy of the law to permit any person to betray a secret with which the law has intrusted him.* Lindsay v. Talbot, Trin. 12 G. 1. Bull. N. P. 284.

2. "But the rule now laid down is confined to cases only in which the facts, to which the counsel or attorney is called *have been communicated to him in the course of business, in instructing him professionally respecting the cause.*"

For 1st, "A counsel or attorney may be called to prove any fact or matter *which they knew before their retainer; for as to that matter, they are in the same situation with other persons.*" Bull. N. P. 284.

2. They may be called to prove *a fact of their own knowledge*, of which they might have had knowledge without being counsel or attorney in the cause.

As if the question was concerning a rasure in a deed or will, they may be examined to the question, whether *they ever saw such deed or will in a different plight*, for that is a fact of their own knowledge; but they should not be examined as to any confessions their client may have made to them respecting it. Ld. Say & Sele's case. Mich. 10 Ann. Per Sir O. Bridgeman with advice of all the Judges.

So if they are to be examined as to the true time of the execution of a deed. Bull. N. P. 484. Ibid.

So where in ejectment brought on an agreement, to which the defendant's attorney was a witness, he was subpoenaed, but refused to give evidence; in consequence of which the plaintiff was nonsuited: The court granted an attachment against him; for a person attesting any instrument is bound to prove its execution; *nor is such incompatible with his situation as attorney for the opposite party.* Doe v. Andrews. Cowp. 845.

In this case on an indictment for perjury, in an answer in chancery, it was held, That his attorney who was with the defendant when he took the oath, could not be admitted to prove the identity of the person, and the fact of his taking the oath; but it is said by Lord Mansfield, Cowp. 846, and Bull. N. P. 284, to be otherwise; on the ground that such is Pex v. Watkins. 2 Stra. 1122.

a collateral matter, and not communicated to him by his client professionally, but a fact which he might know of his own knowledge.

3. "So neither shall the attorney be obliged to produce *papers*, or such like, which may have been delivered to him by his client, as evidence against him; for such would be equally contrary to the policy of the law."

Rex v. Dixon.  
3 Burr. 1687.

Therefore on a motion for an attachment against the defendant, for not producing under a subpoena *duces tecum*, certain vouchers which one *Peach* a client of the defendant, had produced before a master in chancery; and this subpoena *duces tecum* was for the purpose of founding a prosecution for forgery against *Peach*; Lord *Mansfield* and the rest of the court held clearly, That he was not only not bound to obey the subpoena, but that on receiving it, that he should have delivered the papers over to his client.

4. "So the facts to which the attorney is bound not to disclose must be *communications made by the client pending the suit*, as instructions to him in the conduct of it; for if matters are disclosed to him *after the end of the suit*, though they respect it, he may be called on to give evidence of these."

Cobden v.  
Kendrick.  
4 Term Rep.  
431.

As where the present defendant had brought an action against the present plaintiff, on a promissory note for £.150, and had obtained an interlocutory judgment, and executed a writ of inquiry, but had compromised it before execution, by taking part of the money from the plaintiff, and his warrant of attorney to confess a judgment for the remainder. Before this became due, *Kendrick* told *Allen* his attorney, that he was glad it was settled, for that he had only given £.20 for the note, and that he knew it was a lottery transaction. This action was therefore now brought to recover back the money paid by *Cobden* on settling the first action, on the ground of want of consideration for the note; and its being known to *Kendrick* when he took it. *Allen* was called as a witness and objected to; but Lord *Kenyon* admitted him, holding the above distinction as to the mode and time of the communication; and the court of *K. B.* on a motion for a new trial concurred in the distinction.

6. "And this privilege is strictly confined to persons acting in the situation of attorneys or counsel in the cause, and cannot be extended to others, though professionally and confidentially employed."

Wilson v.  
Rastall.  
4 Term Rep.  
753.

For where in an action against the defendant, for bribery at the election for *Newark-upon-Trent*, by himself and his agents, one of whom was one *W. Handley*: *W. Handl.*

*Handley* was called and examined as to certain letters received from the defendant respecting the election: These letters were proved to be in the hands of Mr. *B. Handley*, an attorney: he was called, and proved that he had received them from a Mrs. *Handley*, who had them from *W. Handley*; but *W. Handley* knew of his having them, and desired him to destroy them. He further proved, that he was not concerned as attorney for *W. Handley* (nor could he, being under-sheriff) in any case whatever; neither had he employed any attorney for *W. Handley*, but that *W. Handley* had consulted him confidentially in his profession; and had applied to him before and after the receipt of the letters: that he consulted both with *W. Handley's* attorney by his direction, and with *W. H.* himself: and that these letters were communicated to him in consequence of the defendant's consulting him professionally: the court held clearly, That *B. Handley* was not privileged as an attorney to withhold the letters as evidence on the trial.

And the attorney or counsel is not only prevented from disclosing any matter communicated to him by his client, where the action is against his client, but cannot give evidence of it in any case whatever; therefore it was agreed in the last case, that had *B. Handley* been considered as the attorney of *W. Handley*, that he could not have given the letters in evidence against *Rastall*.

Per Buller Just.  
in S. C.  
4 Term Rep.  
760.

6. But an attorney may be called merely to prove his client's hand-writing to a note, or such instrument, as I have seen in practice.

7. And this privilege of not being compellable to divulge secrets professionally disclosed to them, is confined to the attorneys and counsel only, and does not extend to persons of other professions: For where on the trial of the *Duchess of Kingston's* case, Sir *Cesar Hawkins* the surgeon was called to speak to some matters wherein he had been employed as a surgeon by the *Duchess*, and objected to speak to them, he was ordered by the court to do it, they holding that he had no such privilege.

*Duchess of Kingston's* case.  
11 State Trials.  
243.

## 2. How far Husband and Wife may be Witnesses.

1. These being one person in the consideration of the law, and their interests absolutely the same, they cannot be witnesses for each other, nor against each other, on account of its being likely to create disputes, and so against the policy of marriage.

Co. Lit. b. 6.

In this case which was an action by the plaintiff as a *ferme sole* for goods sold, &c. the defendant called the husband as a witness to prove that she was a married woman; he was

*Bentley v. Cook.*  
Trin. 24 G 3.  
Quot. 3 Term  
Rep. 265.

## EVIDENCE.

was admitted; and the plaintiff confessed; but the court set aside the nonsuit, holding him to be an inadmissible witness.

2. "And this rule is founded on the policy of the law, not on the ground of *interest*."

Davis v.  
Dinwoody.  
4 Term Rep.  
678.

For where in an action against the sheriff of *Adams*, to recover certain household goods; taken by him under an execution against *J. Lewis*; on the ground that these goods, under the marriage-settlement of *J. Lewis*, had been settled to the sole and separate use of *J. Lewis's* wife: and the action was by the executor of the surviving trustee: *J. Lewis* was called as a witness, and was admitted on the ground *that he came to swear against his own interest*; as by shewing the goods not to be his own, he was prevented from discharging by them the execution against himself: but the court held, that he was inadmissible, as coming to give evidence on a matter respecting the interest of his wife; and that interest made no part of the question, which was general, that *in all cases husbands or wives could be witnesses for or against each other*.

3. "So in questions tending to criminate the husband; the wife is an inadmissible witness; and *vice versa*."

Rex v. Cliviger.  
2 Term Rep.  
263.  
Broughton v.  
Harper.  
2 Ld. Ray.  
752.  
S. P.

Therefore where the question was concerning the settlement of a pauper, which settlement was claimed as being the wife of *James Whitehead*; the marriage was proved, but it was insisted on the other side that *J. W.* had a former wife (*Ellen*) living: he denied that he ever was married to *Ellen*; upon which it was proposed to call her: But she was held clearly not to be a competent witness, for her evidence went to criminate her husband, by proving him guilty of bigamy; she therefore was rejected.

Mrs. Rudd's  
case, Leach  
Crown Caf.  
134.

But where on an indictment a woman was called as a witness, she was asked if she did not expect that the conviction of the prisoner would not contribute to procure her husband's pardon, who was then under a capital conviction? *She said she hoped it might*: this it was held went to her credit, not to her competence. This witness was Mrs. *Perron*, whose husband had been convicted on the evidence of Mrs. *Rudd*.

But this rule admits of some exceptions.

Raym. 1.  
Contra Brownl.  
47, and 2  
Hawk. P. C.  
432.  
Ex parte James.  
1 P. Wm. 621.  
Field v. Curtis.  
Gowp. 829.

As 1. In cases of high treason, the wife may be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other.

2. By stat. 5 Geo. 2. 30. the wife of a bankrupt may be examined as a witness touching his estate: but not as to

any thing further respecting his bankruptcy: nor as to the act of bankruptcy where or how committed.

3. On an indictment on 1 Jac. II. for marrying a second wife, the first being living, the first wife cannot be a witness, 287. but the second may; for the second marriage is void.

4. A woman taken away by force and married, may be a witness against the husband, under stat. 3 H. 7. c. 2. against the stealing of women; for a contract obtained by force has no obligation in law. Fullwood's case. Cro. Car. 488.

5. In cases of personal torts by the husband against the wife, she may be admitted as a witness against him; and vice versa.

In Lord Audley's case, the wife was allowed to give evidence against the husband, to prove his assisting in a rape on her. Lord Audley's case. Hutt. 116.

So in an indictment against the husband for an assault on his wife, Lord Raymond admitted the wife to be a witness against him, on the authority of the last case. Rex v. Azire. 1 Stra. 633.

So the wife is always permitted to swear the peace against her husband: and her affidavit has been permitted to be read on an application to the court of King's Bench, for an information against the husband, for an attempt to take her away after articles of separation: and it would be strange to permit her to be a witness to ground a prosecution on, and afterwards not permit her to be a witness on the trial. 2 Hayk. P. C. 431. Lady Lawley's case. Bull. N. P. 287. Rex v. Mary Mead. 1 Burr. 542.

6. "In actions between other parties, the wife has been permitted to give evidence to discharge one of the parties, by charging her husband."

As in an action for wedding-clothes furnished to the wife, and brought against the husband: The defence was, that they were furnished on the credit of the wife's father; and to prove it, the wife's mother was called and allowed, though it went to charge her husband. Williams v. Johnson. 1 Stra. 504.

"So her declarations have been admitted as evidence to charge the husband."

As where it was for nursing the defendant's child, the Ch. Just. allowed the declarations of the wife, that she had agreed to pay four shillings a week, as good evidence to charge the husband; such matters being usually transacted by women. Anon. 1 Stra. 527.

"But it seems doubtful if this last case is law, and if the exception should not be confined only to cases where

"the action is between other parties; for in fact to admit the declarations of the wife to third persons as evidence against the husband, is admitting her testimony against the husband, and so it has been held."

Kerslake v. Shepherd, Exeter Lent Ass. 1786. MSS.

As where in trespass for taking dung: on the cross-examination of a witness, a question was asked tending to show that the *plaintiff's wife had acknowledged that the dung had been sold by the plaintiff to the defendant*; this question was objected to, as it was making the wife evidence against her husband. *Just. Nares* was of that opinion, and rejected the evidence.

Hill v. Hill adm. 2 Str. 1092.

So in an action for wages earned by the wife of the plaintiff from the defendant's intestate, the *Ch. Just.* would not allow the wife's owning the receipt of £. 20 to be given in evidence against the husband.

Co. Litt. 6. 4.

4. "But no other relation shall exclude persons from being witnesses, though their situation may go somewhat to their credit."

Hill v. Wood. Lent Ass. Maidstone, 1789. MSS.

1. In an action of assault, a woman was called to prove the case: the counsel for the defendant asked her on her *voir dire*, if she was not wife to the plaintiff? she answered no; she was then asked if she did not live with him as his wife? This question was objected to, as it could go only to her credit, not to her competence; and therefore could not be asked on a *voir dire*; and it was said, that Lord Kenyon had so ruled it at the last sittings: *Justice Gould* was of that opinion, and that she might have refused to answer it; whereupon she was examined in chief: but another witness being afterwards called, the judge ruled, that he might be asked if the former witness and the plaintiff did not live as man and wife?

2. In the case of parents and children it is the same.

Commins v. Mayor and Burgeesses of Oakhampton. Sayer Rep. 45. 1 Wils. 332. S. C.

As where in an action for refusing to admit the plaintiff to the freedom of the corporation; at the trial the question was, Whether there was a certain custom in the borough to entitle the eldest sons of freemen to their freedom? under this the plaintiff claimed to be admitted, the corporation insisting that it was only by servitude; and whether the *plaintiff's father*, who had obtained his freedom by servitude, was an inadmissible witness to prove the custom? *Per Ch. Just. Lee*, Mere relationship, how near soever, does not go to the competency of a witness, unless there be a vested interest in the matter in question; though it may go to the credit of the witness. In the present case, the father had no interest in the matter in question, nor could he at any future time become interested.



rested, the freedom of the corporation not being transmissible; it rather made his franchise less valuable, by opening it to others who might claim as the son did.

How far a father and mother may be admitted to prove the legitimacy of their children, it is settled,

That the declarations of a father or mother shall never be admitted *to bastardize the issue born after marriage*; but they may be witnesses to *prove when the issue was born*, and to shew whether it was born before or after marriage: So neither shall they be permitted to prove want of access or no connection; for such would be indecent, immoral, and impolitic.

Per Lord Mansfield, Cowp. 592.

“ But they may be in all cases witnesses to prove the legitimacy of their children.”

As in *Pendrel v. Pendrel, coram Raymond*; which was an issue out of chancery, to try whether the plaintiff was heir to T. O. the marriage and birth being admitted by the order, the mother was admitted to prove that the father had access to her.

Bull. N. P. 287. Vid. ante chap. of Ejectment.

So in *Lomax v. Lomax*, the mother was admitted to prove the marriage: and in an ejectment against *Sarah Brodie*, at *Hereford*, 1744, Justice Wright admitted the father to prove the daughter legitimate, her title being as heir to her mother.

Ibid.

### 3. Of Persons inadmissible as Witnesses, on account of Crimes, or being stigmatized by Law.

These are, 1st. On account of conviction for certain crimes to which the law has annexed the punishment of infamy: 2d. On account of religious tenets or principles which destroy their credit in a court of justice.

#### 1. Of Persons infamous, on Account of Conviction by Law for Crimes.

1. The crimes of this description are treason, felony, and what is denominated *crimen falsi*; as perjury, forgery, or the like: for where a man is convicted of these glaring crimes, his oath is of no weight.

Co. Lit. 6.

So if attainted of a false verdict, or of a conspiracy.

Ibid.

But outlawry is no disqualification of a witness, for such is punished by loss of property only, not of reputation; and so does not affect their credit as witnesses.

Co. Lit. 6.

On

Walker v.  
Kearney.  
2 Sara. 1148.

On a rule for an attachment *Nisi*, granted on the affidavit of the defendant, the other party shewed for cause, that the defendant had been convicted of forgery, and stood in the pillory, and produced the record, and an affidavit of the identity of his person. *Per Cur.* The rule must be discharged; for we cannot suffer the affidavit to be read. So in another case, the affidavit of one convicted of forgery to hold a defendant to bail, was refused to be read.

Fiddle's case.  
Leach Cr. Caf.  
382.

So a person convicted of a conspiracy, is an inadmissible witness.

Bull. N. P.  
392.

2. The common punishment that marks the *crimen falsi* is being set in the pillory; and therefore anciently they held, that no man who had been set in the pillory could legally be a witness; but the rigour of this rule is now abated, and it is now held,

Co. Litt. 6. 6.

Rex v. Ford.  
Salk. 690.

That it is the conviction of the crime, not the nature of the punishment, which makes the party infamous; and therefore where the witness had been convicted of *baratry* and *perjury*, but not sentenced to stand in the pillory, that he was incapacitated from being a witness on account of the infamy of the crime.

Mackinder's  
case, H. 27 Geo. 2.  
C. B.  
Bull. N. P. 392.

3. So the magnitude of the crime makes no difference; for a person convicted of petty larceny is equally infamous, and as such as inadmissible a witness as one convicted of grand larceny; for both are felony: but it is now enacted, by stat. 31 G. 3. 36. "That a conviction for petty larceny shall not incapacitate a man from being a witness."

Rex v. Crosby.  
2 Salk. 689.

4. But if a person be convicted, and have an infamous judgment; as to stand in the pillory *ex. gr.* it is not necessary that he ~~shall have actually stood there~~; for it is the judgment to stand there that renders him infamous, not suffering the punishment.

5. "But a general pardon restores the competence of a witness of this description, under the following distinctions."

Salk. 689.

That where the disability of being a witness is part of the judgment itself, there the king's pardon shall not remove it (as in the case of perjury on the statute); for by the statute, it is part of the punishment that the person be infamous, and lose the credit of testimony; therefore if a person be convicted under the statute, the King's pardon cannot restore him: But where the disability is a consequence of the judgment, in such case the King's pardon shall restore the person to his competence of being a witness: As if the

Rex v. Ford.  
2 Salk. 691.  
3 Ref.

the indictment is for perjury at common-law, in such case the King's pardon shall restore the party, for the infamy is the consequence, not a part of the punishment.

But a pardon by act of parliament will restore in all cases: and a burning in the hand amounts to a statute-pardon. 2 Salk. 629. Bull. N.P. 292.

6. And as to how these objections are to be used at trials, it is settled, That where a witness has been pardoned, and afterwards is called as a witness and objected to, on ground of his having been convicted, he must produce his pardon under the great seal; for letters under the King's sign manual are not sufficient, being rather evidence of the King's intention to pardon than a pardon itself. Gully's Case. Leach Cro. Caf. 101.

So the party who would avail himself of the incompetency of the witness, on account of a conviction, ought to have a copy of the conviction ready to produce in court. 2 Salk. 461.

7. "But it seems that the affidavit of a person so convicted, may be read in the case of the person himself where he is a party."

For where the defendant had been convicted of perjury, and in a subsequent case of a judgment against him, it was moved to set it aside on his affidavit, and it was opposed on the ground that he was convicted of perjury; but per Holt, Must he therefore suffer all injustice, and have no way to help himself: and he allowed the affidavit to be read accordingly. Davis & Carter's case, 2 Salk. 461.

But it can only be read in defence of a charge, not in support of a complaint. Charlesworth's case, quoted in Walker v. Kearney.

8. As to how far a *particeps criminis* is a good witness, it is settled, 2 Stra. 1148.

That a *particeps criminis* is a good witness in many cases; as for the plaintiff in trespass, though he is left out on purpose to make him a witness; and a recovery against the defendants in the action is a good bar as to him. Bull. N. P. 286. Per Denison Just. Sayer's Rep. 290.

Therefore in an information for bribery at an election, brought on stat. 2 Geo. 2. the person bribed, and who had taken the bribery-oath, was called as a witness: he was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence: But it was held, That a *particeps criminis* was in many cases a good witness, even to obtain a reward or pardon for himself; and besides, that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as

Enth v. Ralling. Sayer's Rep. 289. Quoted Per Lord Mansfield. Cowp. 199.

as such transactions are generally matters of secrecy: and *Just. Denison* cited a case, wherein *Ch. J. Eyre* admitted such a witness.

*Clerk v. Shee & alt. Cowp. 197.* So where a clerk had embezzled money and notes of his master, which he had laid out with the defendant in illegal insurances in the lottery: On an action brought by the master, he was allowed, on receiving a release, to be a good witness, to prove that the money and notes had been so disposed of by him.

*2 Hawk. P. C. 434.* In criminal prosecutions, according to the opinion of some, a *particeps criminis* can only be a witness in two cases, viz. if he be actually pardoned, or if he has no promise of pardon: but others have holden, that such a promise will be no exception to his competency, but only to his credit; therefore in *Sayer's* case, the court refused to let a witness be examined on a *voire dire*, whether he had such a promise or not.

## 2. Of Persons infamous, on Account of their Religious Tenets or Principles.

Persons of this description are rejected, on the ground, that as it is necessary to have resource to the sanction of an oath, persons denying the being or attributes of the Deity, must consider themselves as not bound by the obligation of an oath, and therefore are not credible.

*Bull. N. P. 208.*

1. Such is the case of infidels and disbelievers, who are inadmissible as witnesses.

*White's case. Leach's Crown Cas. 368.*

Therefore where on an indictment for horse-stealing, a witness was produced, and being examined, he said that he had heard that there was a God; and believed that those persons who told lies would come to the gallows: But he acknowledged that he had never learned the Catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after their death: The court rejected him as incompetent.

2. But it is not necessary that a person should profess the *Christian religion*: Jews are daily admitted, so are persons of other religions; it is sufficient if they profess a religion and belief in the Deity, which will be a tie on them to attest the truth.

*Cowp. 390.*

Therefore persons of different religions are to be sworn according to the ceremonies of the religion they profess: *Jews* are sworn on the Old Testament.

*2 Stra. 1204. At the Council present the two Ch. Justices.*

So on a complaint made by *Jacob Fachina* against General *Sabine*, as governor of *Gibraltar*, *Alderaman Ben Mousa*, a *Moor*,

*a Moor*, was produced as a witness, and sworn upon the *Koran*, without any objection.

So in this case *a Gentoo* was sworn as a witness according to the ceremonies of his religion, and admitted.

Omichund v. Barker  
1 Atk. 21.

3. *Persons excommunicated* cannot be witnesses; for being excluded from the church, they are supposed to be under the influence of no religion.

Bull. N. P. 292.  
3 Black. Com. 101.

By stat. 3 Jac. 1. 5. it is declared "That *Papish recusants convicted*, shall stand to all intents and purposes disabled "as a person lawfully excommunicated:" upon which it has been contested, that these shall also be excluded as witnesses: but Serjeant *Hawkins*, *P. C. vol. 1. fol. 23, 24.* contends, that is too severe a construction of the statute, which should only extend to a disability to bring actions.

#### 4. Of Persons inadmissible as Witnesses, from want of Discretion.

Of this class are persons *non compos*, idiots, madmen, and children whose age incapacitates them from discriminating between right and wrong.

Bull. N. P. 293.

With regard to children, there seems to be no time fixed wherein they are excluded from giving evidence: but it will depend in great measure on the sense and understanding of the child, as it shall appear on examination in court.

Ibid.

On an indictment for assaulting an infant of five years old, with an intent to commit a rape: it was held, That the child might be admitted as an evidence, if she appeared to have any notion of the obligation of an oath: and it was agreed by all the judges, that a child of any age, capable of distinguishing between good and evil, might be examined upon oath; and that, therefore, evidence of what she had said ought to be received.

Brazier's case.  
12 Apr. 1779.  
Bull. N. P. 293.

But, however, this point seems formerly to have been otherwise ruled by very high authorities.

The defendant was indicted for a rape on a child of six years old, and Lord *Ch. Baron Gilbert* refused to admit the child as an evidence: so he was acquitted. But at the same assizes he was indicted for an assault, with an intent to commit a rape; and it coming on to be tried at the next assizes, before Lord *Raymond*, the child was produced as a witness; and it was attempted to distinguish the cases, that this was a misdemeanor, and the other a felony: but the *Ch. Just.* held, That there was no distinction between capital and lesser offences in this respect: for that children of so early an age were never admissible;

Rex v Travers.  
1 Stra. 700.  
Kingston Lent Ass. 1736.  
Hales P. C.  
Not admissible under to years old.

admissible; and cited cases from the *Old Bailey*, where it had so been ruled.

## 2. HOW PAROL EVIDENCE IS TO BE GIVEN.

### 1. Every witness before he is examined must be sworn.

1. "But a witness may be examined as to his religious opinions; and if found to be an infidel or atheist, he may be rejected, that being a conclusive objection." (*But in 726.*)

Anon. Sitt. after  
Hill. 1791.

In a cause at *Westminster* before Lord *Kenyon*, a witness was produced: after being sworn, he was asked "if he believed in the holy gospels of God? After some prevarication, he answered that he believed in them as far as he understood them: he was admitted as a witness.

It was formerly the law, that in criminal cases the witnesses for the prisoner were not sworn; but it is now ordered by *stat. 1 Ann. c. 9.* that they shall be sworn in like manner as the witnesses for the crown; and perjury is in like manner affixable, if they swear falsely.

3 Inst. 79.

2. "In the case of quakers a particular exception is allowed by statute 7 & 8 *W. 3. c. 34.* which allows a quaker's affirmation to be admitted in all cases where the oath is required from others, except in criminal cases."

Upon which statute it has been decided,

Castel v. Bamp-  
bridge & alt.  
2 Stra. 854.

In an appeal of murder a quaker is not admissible as a witness; for it is a criminal proceeding, though the king is not the prosecutor.

Robins v. Say-  
ward.  
1 Stra. 441.

On a motion for an attachment for non-performance of an award, it having been moved on the affirmation of a quaker, the court held that they could not grant it; for though in a suit between party and party, it was a criminal proceeding within the *stat. 7 & 8 W. 3.*

Rex v. Wych.  
2 Stra. 872.

On a motion for an information for a misdemeanor, the court decided it, it being moved on a quaker's affirmation.

Rex v. Green.  
1 Stra. 527.

So a quaker cannot exhibit articles of the peace without oath.

Oliver v. Law-  
rence.  
2 Stra. 246.

So a rule to answer the matters of an affidavit made on a quaker's affirmation cannot be supported.

Rex v. Gardiner.  
2 Burr. 1117.

On shewing cause against an information for a misdemeanor, a quaker's affirmation was offered, the court held, That a quaker's affirmation could not be read in support of a criminal charge, though it might be read in defence of a criminal charge in his own defence, where the person charged the quaker;

quaker; but that where it was in defence of another, where the quaker is not himself charged, there it cannot be read.

So in an action of debt, on stat. 2 Geo. 2. c. 24. for bribery *Atchison v.* at an election, evidence on the affirmation of a quaker is good *Everett.* and admissible; for it is not a criminal proceeding within the *Cowp. 382.* statute.

So on a rule to shew cause why an appointment of over- *Rex v. Turner.* seers should not be qualified, was made absolute on the affir- *2 Str. 1219.* mation of a quaker; for it is not a criminal prosecution, though on the crown side, and entitled in the king's name.

2. As to the manner of swearing.—Persons of the established religion should swear in the usual form; but different sects are allowed to swear in the form usual with them; as *Jews* on the *Ante 35.* Old Testament, and with their hats on: so *Turks* on the *Koran.*

“So sectaries in *England* have been admitted to swear according to their own rites.”

In the year 1657, Dr. *Owen*, vice-chancellor of *Oxford*, *Per Ld. Mansfield, Cowp. 300.* being called on as witness, refused to kiss the book; but desired that it might be opened before him; and he lifted up his right hand: the jury prayed the opinion of the court if they *2 Sid. 6.* ought to pay the same credit to him as to a witness sworn in the usual manner; and *Ch. Just. Glynn* told them, he considered the oath as strong as that taken by any other witness.

There is a sect in *Scotland* who hold it to be idolatry to kiss the book at this day; but their form of swearing is much more solemn. At *Carlisle*, in the year 1745, on the prosecution of some of the rebels, there was no evidence but this sect, who would not kiss the book; a case was sent up to *London* for advice, if they should be received as witnesses; and it was agreed, That their evidence in that case was good. *Per Ld. Mansfield, Ibid.*

3. As to what questions may be asked a witness.

It is a general rule, that a witness cannot be asked any question, the answering of which may oblige him to accuse *2 Hawk. P. C. 432.* himself of a crime, or subject him to penalties or punishment. *Farrell. 119.* *Ante Hill v. Wood, fol. 722.*

But where an application was made to the court to bail the *Rex v. E. Edwards, 4 Term Rep. 440.* defendant, who was charged with grand larceny; one of the wards, bail was asked, if he had never stood in the pillory? This question was objected to, as tending to criminate him: but the court over-ruled the objection, as the answer could not subject him to any punishment. He refused to answer the question, and was rejected.

But

East India Com-  
pany v. Atkins.  
1 Sura. 168.

But where a person going out in one of the company's ships, bound himself by covenant to answer any bill of recovery filed against him, and not to plead the acts of parliament subjecting him to penalties and forfeitures in bar of the bill, it was decided, That to a bill filed he must answer in pursuance of the covenant, even though the discovery might subject him to penalties.

4. How far a witness shall be permitted to use memorandums to refresh his memory, it is settled;

“ That where a witness will swear to a fact from recollection, he may use a minute or memorandum to refresh his memory: But where he will only swear to a fact from seeing it in a minute or memorandum, in such case he shall not be allowed to use such a memorandum; but the original minute must be produced.”

Doe ex dem.  
Church v.  
Perkins.  
3 Term Rep. -  
749.  
Tanner v. Tay-  
lor, ante 142.  
8. P.

In ejectment for several premises at *Wendover*, in *Buckinghamshire*, the question turned on the times when the several holdings expired: To prove these times, *Aldridge* was called as a witness: in giving his testimony he produced a minute, in which was written the times when the several tenants commenced: being examined concerning it, he said that ~~some~~ years before, he had accompanied *Newton* the receiver of the estate, round to the different tenants, and examined them as to their holdings, and minuted down in a book their several declarations as to the time when their holdings commenced: That some of the entries were made in the book by *Aldridge* himself, and others by *Newton*; that the minute from which he then gave his evidence was extracted from the book, but that the book itself was not in court. On his cross-examination, he admitted, *That he had no memory of his own as to the specific facts, but that the evidence he was giving was founded altogether on the extracts he had made from the book*: It was held clearly, that the witness should not have been allowed to give his testimony under those circumstances; and *Ld. Kenyon* cited the following case:

Mich Vac.  
1753.  
Lincoln's Inn  
Hall.

Mr. *Noel* moved to suppress depositions on a certificate from the commissioners, that the witness, whose depositions they were, refreshed her memory during the examination, from minutes consisting of six sheets of paper, of her own handwriting, the substance of which she declared she had set down as the facts occurred to her memory: That five of the six sheets were in the form of a deposition, which she declared had been done for her by the attorney for the plaintiff, whom she had requested to digest her notes, and reduce them to order, and that after that, she transcribed them, and altered



them where it was necessary to make them consistent with her meaning: That the six sheets then produced were entirely her own writing, unassisted by any one, and these she had frequent recourse to during her examination. The Lord Chancellor animadverted with some severity on the practice of so allowing the attorney to draw up the depositions a witness was to use, and suppressed the depositions.

In the last case the Chancellor said, in some cases a man may use papers at law; but I have known some judges (and I think I adhered chiefly to that rule myself) to let them use papers only drawn up as the facts happened.

But in this case Mr. Le Roche was permitted to refresh his memory by a copy from his own memorandum, which copy had been taken by another, but under his own directions.

Duchess of Kingston's case. 11 St. Tr. 253.

5. As to how it is to be given to the jury,—it must be done in open court.

For where the jury having withdrawn to consider of their verdict, one of the witnesses who had before been sworn for the defendant was called before them, and they re-examined him, and then they gave a verdict for the defendant: complaint being made of this to the judge of assize, he questioned them concerning it, which they owned, but that the evidence was the same in effect as that given before, *et non alia nec diversa*. This matter being returned on the *postea*, the court were of opinion, That the verdict was not good, and ordered a *venire facias de novo*.

Metcalf v. Dean. Cro. Eliz. 189.

And note, That a witness after he has been examined in chief, and cross-examined, cannot regularly be objected to for incompetence.

Per Ld. Mansfield, 4 Burr. 2252.

But a witness excepted to by one party and set aside, may be afterwards called by that party, and examined on his side.

Atwood v. Dent. 1 Sura. 480.

## 2. OF WRITTEN EVIDENCE.

Written evidence is either public or private.

Public is, 1st. Records properly so called; that is, memorials of the legislature, and of the King's courts of justice, which are matters of the highest authority: 2d. Public matters not records: 3d. Private, as written documents belonging to individuals; as deeds, notes, &c. which derive their credit from the proof of their execution, by the party against whom they are produced.

## I. OF RECORDS.

Records are of two sorts: 1. Acts of parliament: 2. Proceedings or records of courts of record.—In treating of which I shall consider,

1. The nature of each: 2. How they are to be given in evidence.

## 1. Of Acts of Parliament.

1. Acts of parliament are either public or private; and they differ in the following respects:

4 Co. 76.

Whatever concerns the kingdom in general is a general law; but whatever concerns only a particular class of men, or some individuals, is a particular law; the first is the object of general or public acts of parliament; the latter of private acts.

Bull. N. P. 223.

1. Therefore a law which concerns the *King* is a general law, for he is the head and union of the commonwealth.

Ibid.

2. So a law that concerns *all lords* is a general law, because it concerns all the property in the kingdom; it being all held under lords mediate, or immediate.

Ibid.

But a law which concerns only *the nobility or lords spiritual*, is only a particular law, because it relates to one set of persons; as for example, a law making them liable to certain process.

Ibid.

But, perhaps, a law respecting the *whole body of the peers* would be deemed a general law; for as such they are part of the legislature, and what relates to the constitution is a general law.

Ibid.

3. What relates to *all officers* in general is a general law, because it concerns the universal administration of justice, as *ex. gr.* "That no sheriff or other officer shall take a reward for executing his office." But if it relates to *particular officers* and not to the administration of justice, it is a particular law.

Bull. N. P. 223.

4. What relates to *all spiritual persons* is a general law, inasmuch as the religion of the kingdom is of general concern to the whole kingdom; as the several statutes of 21 Hen. 8. 13 Eliz. 10. and 8 Eliz. 11. concerning the leases of ecclesiastical persons: but the stat. 11 Eliz. of *Bishops Leases*, is a particular law, as it respects only one set of spiritual persons.

5. As

5. An act that relates to and comprehends *all trades*, is a *general law*, and because it relates to traffic in general, but an act respecting butchers or bakers only, is a *particular law*.

6. If the matter of a law be ever so special, if it *relates* *ibid.* *equally to all*, it is a general law: but a law *relating to some particular county or parish*, is a particular law.

7. A private law may become a public one, by being re-*Saxby v. Kirkus.* cognized in such public one; as the stat. 23 *Hen. 6.* 10. of *Sayer, Rep.* 116. *Sheriffs bonds*, is a private law; but being recognized in stat. 4, 5 *Ann.* 16. which enables sheriffs to assign it, it becomes a public one.

8. So a law may be both general and particular in different *Bull. N.P.* 224. *parts*; as *ix. gr.* 3 *Jac. 1.* *against recusants, in disabling them to present*; which is general: but the clause giving their presentations to the universities, is a particular law.

2. Private and public acts again differ in the manner the courts take notice of them.

1. A general act of parliament is taken notice of by the *Bull. N.P.* 222. judges and jury, without being shewn to them: but a *particular act* is not taken notice of unless it is shewn: for the court cannot judge of particular laws which do not concern the whole kingdom, unless that law be exhibited to the court: for they are obliged to judge *secundum leges & consuetudinem Angliæ*; and therefore a particular law not being *lex Angliæ*, as not relating to the whole kingdom, they are not *ex officio* obliged to take notice of it, unless, like other matters, it is brought before them.

2. But a private act of parliament, or any other private re-*Hob.* 272. cord, may be brought before the jury, and given in evidence if it relates to the issues in question, though it be not pleaded: for *Cro. Jac.* 112. the jury are to find the truth of the fact in question, according to the evidence brought before them. And, if therefore the private act do evince the truth of the matter in question, it is as proper evidence to the jury as any record or other evidence whatever; perhaps the most proper sort of evidence.

But, however, such is not in all cases admissible, for there *Bull. N.P.* 224. are cases in which both public and private statutes ought to be pleaded, and that is, where they make void any legal solemnities: and the reason why they must be pleaded is this: that as *foreign contracts* are not deemed nullities, but voidable by the parties prejudiced, as *quisquis renunciare potest jure pro se introducto*; perhaps the party might wish to waive the benefit of the

the statute; but to construe them nullities would be to lay the rule aside, and the party must receive benefit from the law whether he would or not; and therefore it is required that he shall plead such statute, to shew that the party takes the benefit of it.

*Ibid.*  
4 Co. 117.  
Hob. 72.

Another reason for this is, that as it is matter of law what solemnities are necessary to a contract, it must, in like manner, be matter of law how they are to be defeated. As therefore, where the action is founded on a contract, it must be shewn to the court; so it must, in like manner, be shewn to the court where it is to be defeated. Therefore the stat. of *Eliz.* touching usurious contracts, cannot be given in evidence, though a general law, but it ought to be pleaded. So a fine is declared to be void by the statute of *Westminster*, 2. 1. but is held only to be voidable; so a recovery by a wife with a second husband is declared to be void, by statute 11 *Hin.* 8. but is construed only to be voidable. In all these cases therefore the statutes must be pleaded.

2 Inst. 336.  
4 Co. 59.

*Bull. N. P.* 225. So in an action or information on a penal statute, if there is another statute that exempts or discharges the defendant from the penalty, he must plead it, and cannot give it in evidence on the general issue; for the general issue is only a denial of the declaration, and the plaintiff has proved the defendant guilty when he has proved him within the law upon which his declaration is founded: but if the defendant would exempt himself from the charge, he should not have denied the declaration, but have shewn the law that discharges him.

*Rex v. Pemberton.*  
1 Black. Rep. 230.

*Tamen quare*, If this be law? for on a motion to quash an indictment on a penal statute, 5 *Eliz.* for exercising the trade of a tanner, on the ground that there is another stat. 1 *Jac.* 1. 22. which exempts tanners from prosecution in several cases, it was objected that the indictment should state the defendant was not within any of these exceptions; as in convictions in the game-laws all exemptions are to be expressly negatived: But the court held, that *exceptions of this sort are to be taken advantage of in evidence, on not guilty*; and so refused to quash the indictment.

*Rex v. Hall.*  
1 Term Rep. 322.

In this case it is said, *per Cur.* If a subsequent statute makes an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception.

3. Another case of giving statutes in evidence is, where there is a proviso.

If the *proviso* is *matter of fact*, it may be given in evidence under the general issue: as if an action of debt is brought against a spiritual person for taking a farm, and the defendant pleads *quod non habuit nec tenuit firmam contra formam statuti*, the defendant may give in evidence under that issue, *that it was for the maintenance of his house*, according to the proviso of the statute which allows it. But on an information under § Ed. 6. 14. for ingrossing, the defendant cannot, on the general issue, give in evidence *a licence of three justices* within a proviso of that statute; because, whether there was sufficient authority or no, is *matter of law*, and therefore must be pleaded. Bull. N. P. 225. Godb. 145.

But a saving proviso may be given in evidence on the general issue, because, if the party be within the proviso he is not guilty within the body of the act on which the action is founded. Rex v. Pen. Jones 380. 2 Roll. Ab. 68. Godb. 144.

4. The *title of a statute* is no part of the law, nor shall its conciseness control the body of the act; for it does not pass with the same solemnity as the statute itself: one reading of it is often sufficient. Per Ld. Mansfield. 1 Black. Rep. 95.

## 2. OF PROCEEDINGS IN COURTS OF RECORD.

Proceedings in courts of record, which are the second species of public evidence, are, 1st, Fines and Recoveries: 2d. Verdicts: 3d. Judgments: 4th. Writs: 5. Affidavits.

### 1. Of Fines and Recoveries.

These are matters of record, and conclusive evidence.

But, as a *præcipe* does not lie against a person that is not seised of the freehold, therefore, when you shew a recovery *you must prove seisin in the tenant to the præcipe*: however, in an ancient recovery *seisin will be presumed*; especially where possession has gone agreeable to it since; for that fortifies the presumption that every thing was rightly transacted: but, in a modern recovery, the *seisin* must be proved; because, from the recency of the fact, it is easily done: and presumption, in such case, is not equally fortified by subsequent possession. Green v. Proude. 1 Mod. 117. 1 Vent. 257. Bull. N. P. 230.

But though in the cases of old recoveries, the court will presume that there were proper tenants to the *præcipe* where no deed appears; yet, where deeds appeared inrolled for that purpose, wherein proper parties had not joined, and uses were declared to be warranted by such deeds, the court would not presume that there were any other. *Vid. Plen. ch. Ejectment, ante fol. 487.* Keen ex dem. Earl of Portland v. Earl of Effingham. 2 Stra. 1267.

## 2. Of Verdicts.

*Per Pratt. Just.* 1. As to verdicts, it is a general rule that no verdict shall be given in evidence, but between such as were parties in the cause in which the verdict was given, or privies to them.  
*1 Stra. 68.*  
*1 Raym. 730.*

*Ibid.*

Therefore, a verdict on an indictment cannot be read on an action for the same cause; as an assault, *ex gr.* for the one is a the suit of the king, the other at the suit of the party.

*Jones v. White.* However, in this case, which was an issue out of chancery, *1 Stra. 68.* *devisavit vel non*, on which it was insisted, That the testator was *non compos* on the 29th, having shot himself the 31st: the court were divided, whether the verdict of the coroner's inquest, which found him a lunatic, was admissible evidence or not.

“ However, the above rule seems to be correct, and the reason for it is, That it is the privilege of the party to cross-examine the witnesses; of which, by this means, he would be deprived.”

*Sherwin v. Clarges, 1700.* Therefore, a verdict on the *same point*, and between the *same parties*, may be given in evidence, though *the lands are not the same*: In that case, the parties have had the liberty of cross-examination; and nothing can be more opposite to natural justice than that a man should be bound by a decision, which he had not an opportunity of opposing and controverting. But it can be no objection to the evidence *that the lands are different*; for the object of dispute makes no difference as to the right.  
*Bull. N. P. 232.*

*Bull. N. P. Ibid.* Therefore, in a trial between *A. lessee of B. and E. and C. lessee of E. and B.* in which the parties have only changed places from plaintiff to defendant, either party may give the former verdict in evidence, for there each party had the benefit of cross-examination; and the court will take notice, that in ejectment the lessor is the real plaintiff, and the lessee or nominal plaintiff, a fictitious person.

*Lock v. Norborne.* Another reason why verdicts are only admitted in evidence between the same parties, is this: That as a stranger should not be prejudiced by a verdict in a cause to which he was not a party, he therefore shall not have any benefit from it; *3 Mod. 147.* *Hard. 472.* *Cas. K. B. 319.* *lock v. Norborne.* record or conviction, or verdict, shall be given in evidence, but such whereof the benefit may be mutual, viz. Such whereof the defendant, as well as the plaintiff, might have made use; and given it in evidence in case it made for him.

Therefore

Therefore a verdict on an indictment is not evidence in an action for the same cause; for as no person can be a witness in his own cause in an action, though he may be on an indictment, to allow a conviction on an indictment to be evidence, would be to admit the parties own evidence; which should not be.

Gibson v. Mc.  
Carty  
Chs. temp.  
Hardwick. 311.

“ But a verdict may be given in evidence in case of *privies*, under the following distinction :

If there be several remainders limited by the same deed, a verdict for one in remainder shall be given in evidence for another in remainder; but if there be a recovery against a tenant for life, this is no evidence against the reversioner: for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid the reversioner or not; and the reversioner cannot possibly contest the matter where no aid is prayed: but, as if he comes in on the aid prayer, he may have an attain, consequently the verdict can be evidence against him.

Per Glyn.  
Hard. 426.  
Yelv. 32.

But where it is said that a verdict may be given in evidence between the same parties, it is to be understood with this restriction: *That it is of a matter which was in issue in the former case*; for otherwise it will not be allowed in evidence, because if such verdict be false there is no redress, nor is the jury liable to an attain.

But to the rule now laid down, are the following exceptions :

1. “ In the case of tolls and customs.” For the custom or toll is the *lex loci*: and facts tending to prove that, may be given in evidence by any person, as well those who have been parties to such suit or to such verdicts as have found and determined them: and in such case it is not material whether such verdict be recent or ancient.

City of London  
v. Clerke  
Carth. 181.

2. “ Whether *parcel or not of a manor*, old inquisitions are admissible evidence.”

In this case a commission under the great seal of the exchequer, *Pasch. 33 Eliz. Rot. 290, in Scac.* directed to five commissioners, who were to enquire by the verdict of a jury, if the prior of *St. Swithin of Winton*, was seised of lands, called *Woodcrofts*, as parcel of the manor of *Hinton Daubery*; and whether King *Hen. 8. Edw. 6, &c.* were seised of it, &c. on which was a return by verdict, “ That the prior was seised of it as parcel of that manor,” &c. This was admitted as good, but not conclusive evidence of the facts contained in it; though

Tooker v. D. of  
Beaufort.  
1 Burr. 146.

though the defendants in this case were no parties to the inquisition.

*Jones v. White.* So in this case it was agreed by the court, that an *inquisitio post mortem* was good evidence.  
1 Stra. 68.

"And it is evidence, though there has been a mis-trial of the inquisition."

*Leighton v. Leighton.*  
1 Stra. 308.

For where on a trial at bar, the defendant made title under an old intail; and among other things offered in evidence an *inquisitio post mortem*, 25 H. 8. whereby it was found that the deceased tenant was seised in fee, and upon a traverse it went down into *Salop*, where it was found that the tenant was only seised in tail, on which judgment and an *amoveas tenens* issued; it was objected that this was a mis-trial; for that the lands lay in *Wales*, and that the trial here was in *Shropshire*, it being before stat. 27 Hen. 8. 26: which united *England* to *Wales*, and so was *coram non judice*: But the court ordered it to be read, saying it was not void, but voidable.

### 3. "A third case is that of commoners."

*Per Buller Just.* If an issue has been tried in an action by a commoner, on a right of common, upon a custom extending over the whole manor, a verdict on that issue would be evidence in another action, by another commoner, respecting the same right of common: aliter where the common is claimed as belonging to a particular estate.  
1 Term Rep. 302.

4. "In cases of pedigree principally, in which *hearsay* and *reputation* are evidence, there a verdict, though not between the same parties, is evidence."

*Bull. N. P.*  
223.

As in such case a special verdict between other parties stating a pedigree, would be evidence to prove a descent; for in such case, what any of the family have been heard to say, general reputation in the family, entries in family-books, monumental inscriptions, recitals in deeds, are allowed.

*Neal ex dem. Duke of Athol v. Wilding.*  
2 Stra. 1151.  
*Bull. N. P.* 233.

However, in this case, where a special verdict was offered in evidence of a pedigree, *Wright Just.* was for admitting it, but the rest of the court refused it: But it is said by *Just. Buller*, that *Just. Wright's* opinion is now generally taken as the law.

*Per Holt. G. Hall.* 14 W. 3.  
*Bull. N. P.*  
243.

5. A verdict with the evidence, given in an action, brought by a carrier, for goods delivered to him to be carried, shall be given in evidence, in action by the owner for the same goods, against the carrier: For it is strong proof that he had the plaintiff's goods; and if the witness is dead or not to be found, it is the best evidence; for it amounts to a confession in a court of record.



### 3. Of Judgments.

Judgments come nearly under the same rule as verdicts; for regularly, no judgment is admissible evidence, but against parties or privies.

But there are some exceptions :

As on an information, in nature of a *quo warranto* against Rex v. Hepden. the defendant as bailiff of Scarborough; he made title as elected a Stra. 1109. under the bailiffship of *Batty and Armstrong*; and upon issue joined whether they were bailiffs or not? a record of judgment of *ouster* against them was read in evidence. On a motion for a new trial, it was held to have been properly admitted.

### 4. Of Writs.

Writs are to be given in evidence differently where they are only inducement, and where they are the gift of the action.

Where a writ is only inducement to the action, the taking *Bull. N. P.* but the writ may be proved without any copy of it; because, <sup>234</sup> possibly, it might not be returned, and then it is no record: but where the writ is the gift of the action, there must be produced a copy from the record; for it does not become the gift of the action till it is returned; and it is necessary to have the best evidence the nature of the thing is capable of. *Fid. ante, ch. Trespass.*

### 5. Of Affidavits.

1. " Affidavits must be regularly entitled, in order to make them evidence."

Therefore, where affidavits were produced without any *Per Ld. Kenyon* title of the cause, the court would not allow them to be read; <sup>2</sup> T. Rep. 644. though the counsel on the other side were willing to waive the objection.

So if they are misentitled, as in mistaking the christian *Nix v. Jowatt.* name of any of the parties. *Hil. 31 G. 3.*  
*M38.*

But where the application is to make a *submission to an arbi-* *Bevan v. Bevan.*  
*tration a rule of court*, under the statute, where there has been <sup>3</sup> Term Rep. 601. no action, the affidavits upon which one of the parties applies for an attachment for non-performance of the award, need not be entitled in any cause; for there is then no action; but the affidavits in answer to the application must be entitled,

So

Rex v. Jones.  
1 Stra. 704.

So on a rule for an information being moved, the affidavits were intitled in no cause; but the affidavits shewing cause were intitled, *Rex v. Jones*, and held to be right; for till the rule granted there was no cause in court.

Rex v. Lewis.  
2 Stra. 704.

So on moving for a *certiorari* to an inferior court, the affidavits were intitled *Rex v. Lewis*; and objected that there was no such cause then in court: but the court held it sufficient that there was such cause in the courts below.

Rex v. Sheriff  
of Middlesex.  
3 Term Rep  
133.  
Wood v.  
Webb.  
3 Term Rep.  
253.

Till an attachment issues, the proceedings must be on the civil side, after it issues on the crown side: so that in moving for an attachment the motion and affidavits are to be entitled "*of the cause*;" after the attachment, they are to be entitled "*the King v. the person to be attached*."

2. Now by rule of court in *Easter Term*, 31 Geo. 3. it is ordered, "That where any affidavit is taken by any commissioner from any illiterate person, the commissioner taking it shall certify or state in the *jurat* that the affidavit was read in his presence to the party making the same; and that such party seemed perfectly to understand it; and also wrote his or her signature in the presence of such commissioner."

Rex v. James,  
1 Show. 397.

3. "And affidavits made in the course of any cause used and filed are good evidence, and admissible at the trial of the cause without further proof; as if taken before a commissioner, that he was a commissioner," *ex.gr.*

Cameron v.  
Lightfoot.  
2 Black. Rep.  
1191.

As in this case, which was trespass for false imprisonment of the plaintiff; an affidavit made by the defendant, shewing cause against a rule for discharging the plaintiff out of custody, was admitted without further proof.

S. C. *supra*.  
1 Show. 397.

And proof of such a cause depending, and that such affidavit was sworn by the party, would perhaps be sufficient proof even on an indictment for perjury; but the copy of it would not.

Per Lord  
Kenyon.  
4 Term Rep.  
890.

4. Affidavits filed in one cause, may be read as evidence in another, and to affect persons, not parties to the cause; as the attorney, officers, &c.

5. *Voluntary affidavits* are evidence against the party. *Vol. post.* under the head of Answer in Chancery, how far evidence.

## 2. HOW MATTERS OF RECORD ARE TO BE GIVEN IN EVIDENCE.

1. As to the general rules of giving them in evidence:

2. How each in particular.

1. How

1. How Records in general are to be given in Evidence.

1. "Records are evidences of the highest nature, and are conclusive evidence of the matter in question: no averment is permitted against them; therefore, whenever a question or cause of action arises on a record, the party cannot deny or aver against the record, but only deny that there is such a record; that is, by the plea of *nul tiel record*." Co. Litt. 117.

"Whenever therefore this plea is pleaded, it *shall only be tried by the record itself*; and every matter which can be tried by the record shall be so tried; nor can the party bring it *ad aliud examen*."

As where in *assumpsit* the defendant pleaded in abatement, "That he was an attorney of the court, and so privileged;" the defendant replied that he was not an attorney, and *concluded to the country*. On demurrer it was held, That he should have concluded to the record, *as the names of all attorneys of the court are kept on a roll, which was a record of the court*, and by which it should have been tried, if the party was an attorney of the court or not. Forster v. Calver  
1 Stra. 78.

So if a man justify the having done a thing as a justice of peace, the question whether a justice of peace or not? must be proved by the record of the commission of the peace. 2 Roll. Ab.  
574.  
Pl. 9.

"But where the issue is on a matter of fact connected with a record, that shall be tried by a jury."

As if the question was, *whether the defendant did appear?* that must be tried by the record, because the appearance ought to be entered on record: but if the question be if the defendant did appear *on a day certain*, that shall be tried by a jury; for it is not necessary to enter the day of the appearance on the record. Hoe v.  
Marshall.  
Cro. Eliz. 131.

If the question be whether *J. S. were sheriff of the county of Kent?* it shall be tried by the record: because *every sheriff is appointed by letters patent, which are always recorded*. Abbot of Str  
Marcella's  
case.  
9 Co. 31.

But if the question was, Whether *J. P. were under-sheriff to J. S.?* that shall be tried by a jury: for the appointment of an under-sheriff is never recorded. Bro. tria  
Pl. 113.

If the sheriff, after having returned *cepi corpus*, plead to an action of escape that the party never was in custody, the question, whether the party ever was in the sheriff's custody? may be tried by the record of the return. 2 Roll. Ab.  
574.  
Pl. 7.

But

Ibid. Pl. 8.

But if the sheriff had returned *non est inventus*, and an action been brought for the escape, whether the party was arrested or not, shall be tried by a jury.

Hynde's case.  
4 Co. 71.

If the question be whether a deed be inrolled, it is to be tried by a record of the inrollment: but a question *as to the time of the inrollment* shall be tried by a jury; for such is not necessary to be inrolled.

Rex v.  
Knollys.  
Ld. Raym. 14.

If the question be, Whether a person has a right to peerage *by writ*? it shall be tried by a record of the writ; but whether a person have a right to a peerage *by descent*, it shall be tried by a jury; for it never can appear by the record that the person claiming the peerage was descended from him who was first created a peer,

12 Co. 92.  
Bull. N. P. 230.  
Abbot of Strata  
Marcella's case.  
9 Co. 30.  
Co. Litt. 117. b.  
Bro. Ab. Tr.  
Pl. 40.

2. Records may also be given in evidence by exemplification or by a copy: and in what cases the record itself, or an exemplification, or when a copy is evidence, the distinction is this; where *the record is the ground of the action* it makes part of the pleadings, and appears in the allegations: in such case it is tried *on the issue of nul tiel record*; and it shall be tried by the record, as a record is evidence of itself.

Ibid.  
Biggsw.  
Wharton.  
Palm. 524.

But where the record is *only inducement*, in which case it is not traversable (for nothing is traversable that does not make an end of the matter; and it cannot make an end of the matter if fact be joined with it) in such case therefore the issue must be on the fact, and be tried by the jury; a copy of the record may be given in evidence to support the fact; for whenever a record is offered to a jury, a copy is evidence.

Co. Litt. 117.  
b.

So that the difference of the two cases is this: in the former the issue goes to the court; for *nul tiel record* is an issue in which the record itself is the only proof, and that the court themselves inquire into: for no averment will be admitted against a record; but where the issue is on other matter and the record is only inducement, as the case of an escape, *ex. gr.* the writ is inducement and the escape matter of fact; in which case it is only necessary to show that *there was a writ*, as being an averment in the declaration necessary to be proved; and so a copy is proof of that.

Whitmore v.  
Rooke.  
Sayer 299 &  
Cas. ibid. cit.

So where the action was debt on a bail-bond by the assize of the sheriff, the plaintiff alleged a *precept*, called a bill of *Middlesex*, sued out against the defendant in the original action: the defendant alleged that no such precept issued: the plaintiff replied that there did, as appears by the record.

of the court, and prayed that they might be inspected: On demurrer the question was, If the conclusion was good? and *per Cur.* The issuing of a writ from another court, as of an original from the court of chancery, is never a record of this court, until the return of it is filed; but the issuing of a writ from this court, although no return thereto is filed, is always a matter of record of this court, because there appears on the roll an award of the writ.

Whenever therefore the trial is by the record; that is, on the issue of *nul tiel record*, a day is given to bring in the record; if the record pleaded is a record of another and inferior court, the party pleading it must sue out a *certiorari* to the officer of that court who returns it; and he can only have it by *certiorari*, not by an order on the officer to produce it; but if the record pleaded be of a superior court, there the party pleading it must sue a *certiorari* out of chancery; into which court when it is returned, it is sent by a *mittimus* from the chancery into the court where it is pleaded.

Bro. Fail. Rec.  
plac. 2.  
Ibid. Pl. 3.  
Hewson v.  
Brown.  
2 Barr. 1024.  
Ibid. Pl.

If the record is of the court where it is pleaded, or of a superior court, if it be not brought in on the day given, it is a failure of record; but if it was a record of an inferior court, if it is brought in on the day, it is not a failure of record; but the party must sue out an *alias* or *pluries certiorari*; for in this case he is guilty of no neglect, as he is in the two former.

“ When the record is brought in it is good evidence, or otherwise under the following distinctions:”

1. “ If the record be set out imperfectly or partially, it is sufficient if enough appears to prove the matter in dispute.”

Bro. Fail. Rec.  
Pl. 4.

As if a man pleads a *recovery* suffered of one acre, and the record brought in is a *recovery* of two acres, this is good, and not a failure of record; as if two were recovered one certainly is.

Ibid.

So if a man declares on a recognizance by *J. S.* and the record is of a recognizance of *J. S.* and *J. N.* jointly and severally, it is good; for *J. S.* is liable for the whole.

Ibid.

2. “ So a variance in a part not material is not fatal.”

As if there be pleaded a record of an *outlawry* of the plaintiff, at the suit of *J. S.* and on bringing in the record it is an *outlawry* at the suit of *J. N.* it is not a failure of record; for the material question is, Is there any *outlawry* against the plaintiff:

Bro. Fail. Rec.  
Pl. 1.

*Coachman v. Halley.*  
Hob. 179.

So a variance as to a continuance is no failure of record; for the continuance is not a material part of the record.

3. "But a variance in a material part is fatal."

*Raffall v. Stratton.*  
H. Black. Rep. 48.

As where the plaintiff declared in debt on a judgment of *Trinity Term* 1787, and on *nul tiel record* pleaded, the record was brought into court, and appeared to be the record of a judgment of *Easter Term*, 1788; this was adjudged to be a failure of record.

S. C.

So where the declaration stated a judgment recovered, at the suit of *one*, and it appeared to be at the suit of *two* persons, it was adjudged to be a failure of record.

*Parry v. Paris.*  
Hob. 209.  
Hard. 200.

But if a record of *one day of a term* be pleaded, and a record of *another day* be brought in, this is not a variance; for the whole term is but one day in the eye of the law.

*Bro. Fail. Record*, fol. 16.

*Aliter* where the day is material.

*Bro. Fail. Record*, pl. 11.

So if a man pleads the outlawry of the plaintiff by the name of *J. S. Knight*, and the record brought in, be of *J. S. Gent.* this is a failure of record.

*Dyer* 87.

So if the record of the outlawry brought in, vary from that pleaded *in the day of the return of the exigent*, it is fatal; for the day is material.

And wherever there is a failure of record, the party pleading it has judgment against him.

*Per Lord Mansfield.*  
*Dougl.* 6.

But it is to be observed, that the records which are of themselves conclusive evidence, are records of the courts of record in *England only*; for though an action lies on the judgment of a foreign court, the record of that court is not conclusive evidence, but the action is debt or *assumpsit*, and must go to the country.

*Walker v. Witter.*  
*Dougl.* 1.

Therefore where the action was on a judgment of the courts in *Jamaica*, and the declaration concluded with a *probat per recordum*, it was held to be wrong and was rejected; and the plea of *nul tiel record* a mere nullity.

*Ibid.*  
*Co. Litt.* 117.  
b.

And this doctrine is general as to all courts in *England* not of record, as *ex. gr.* the great sessions of *Wales*, which is not a court of record; so of the county-court, hundred-court, and court-baron.

*Bull. N. P.*  
226.

3. Another reason why copies of records should be good evidence, is, that being things of a public nature, to which every one has a right to have recourse, they cannot be transferred from place to place to serve a particular purpose; therefore copies, if properly authenticated, are good evidence;

evidence; but a copy of a copy is not evidence; for the best evidence the nature of the thing will admit must always be given, and the further any thing is removed from the original truth, the weaker the evidence must be; besides, there is a chasm in the proof, because it cannot appear that the first copy was a true one.

These copies therefore are twofold: 1st, Under seal: and 2dly, Not under seal.

### 1st. Of Copies under Seal.

1. Copies under seal are called *exemplifications*, and are of Bull. N.P. 226. better credit than any sworn copy; for the courts of justice, by putting their seal to them, attest their authenticity, as *Tooker v. Duke of Beaufort.* done under their authority, by persons more capable to examine, and more critical and exact than another person is or can be. *Sayer Rep. 297.*

Exemplifications are twofold: under the broad seal, and under the seal of the court.

1. Exemplifications under the broad or great seal, are of Bull. N. P. 226. themselves records of the greatest validity, and to which the *10 Co. 93.* jury ought to give credit under the penalty of an attainder.

These records so exemplified under the great seal, are either *Ibid.* records of the courts of *Chancery*, or have issued from it, or are sent for into the court of *Chancery* by *certiorari*, which is the center of all the courts, and from thence the subject receives a copy under the attestation of the great seal.

But upon exemplifications under the great seal, it is to be observed,

1. That nothing but records exemplified under the great Bull. N.P. 227. seal, may be admitted in evidence; for being there preserved by the proper officer of the court, they are supposed to be free from all rature and corruption, and fair and unblotted, so that there can be no danger from the exemplification; but *deeds* exemplified under the broad seal cannot be given in evidence; for they being in the custody of the party, and not of the law, are subject to razures and interlineations, and therefore ought to be produced themselves, as the best evidence of the contract.

2. When the record is exemplified, *the whole ought to be exemplified*, for the construction must be on the whole taken together:

together: however, this rule must be taken with some restriction. See after, about giving sworn copies in evidence.

3. "In some cases an exemplification of a record is not complete evidence of all matters contained in it."

2 Roll. Ab. 672. As if letters patent be given in evidence, in which it is recited "That a certain office was before granted to J. S. and that J. S. surrendered it to the King, who accepted the same, and granted it to J. D." this is not enough to avoid the title of J. S. but the record of the surrender must be shown, or a true copy of it; for the recital of such surrender is not the best evidence that the nature of the thing will admit, and it would be of dangerous consequence, if by such sort of suggestion a man's title might be avoided; but if letters patent were given in evidence whereby, in consideration of the surrender of former letters patent, the King grants a particular estate to the party, this would be sufficient proof of the surrender; for the taking of an estate by the second letters patent, is itself a surrender of the first; the second letters patent are the best proof of the taking such estate, and then the surrender is by operation and construction of law.

Earl of Montague v. Ld. Preston.  
2 Vent. 170.

So if the question turns on the surrender of a former grant, which is denied by the defendant, and to prove the former grant, he takes advantage of the recital in the latter (as in case first put above) he shall be bound by the recital of the surrender; for he must take the whole together; but if he only relies on the former patent which he produces, it will put the plaintiff on proving the surrender.

Cragg v. Norfolk.  
2 Lev. 108.

So if letters patent recite a former grant to another, and grant of the office to commence from the determination thereof, the party claiming under the second must produce a copy of the first, that the court may see that it is determined; for there can be no other proof of the determination of the grant than the grant itself, though perhaps in such case if the record were that it was determined, the whole recital would be taken together.

Roll. N. P. 227.

2. The second sort of exemplifications are those under the seal of the court where the record is kept, and such are of higher credit than any sworn copy; but these can only be of records of that court, under whose seal they are exemplified.

Whitehead's case, cit.  
Hard. 120.

And the exemplifications of fines and recoveries under the town-seal, where the records were consumed, has been admitted in evidence.



## EVIDENCE.

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So has the exemplification of a recovery in a court of ancient demesne being old, and the records lost. Green v. Proude.  
1 Mod. 117.

By stat. 27 Eliz. 9. the exemplification of a recovery in Wales, or a county palatine, is of the same validity as the original records. Olive v. Gwin.  
Hard. 118.

### 2. Of Copies of Records not under Seal.

These copies are of two sorts: 1. Sworn copies: 2. Office-copies.

Of each of these, and how given in evidence.

#### 1. Of Sworn Copies.

*Sworn copies* are the copies of records which the witness who produces them swears he examined with the original; as the copy of a judgment from Ireland, ex. gr. or from one court in Westminster-Hall to another.

1. But the copies so admitted must be copies of records brought into court in parchment, and not of a judgment (ex. gr.) in paper signed by a master, though upon such judgment you may take out execution; for it does not become a permanent matter till it be delivered into court, and is there fixed as a roll of the court; for until it become so fixed, it is transferable, as not being a roll of the court; of which only the law allows copies, as they ought not to be transferred from place to place. Ball. N. P. 228.

But a copy may be given in evidence where the record is lost, without swearing it a true copy; for the record is in the custody of the law, and therefore if lost, there ought to be no injury to the parties right; and consequently the copy ought to be admitted without swearing to any examination of it, since there is nothing with which it can be compared; but in such case the instrument should be according to the rule required by the civil law, *vetustate temporis aut judicaria cognitione roborata*. Green v. Proude.  
1 Mod. 117.  
Salk. 285. 6. 8.

As in ejectment for a rectory, to which a recusant had presented, the record of the conviction being proved to have been burnt, it was allowed so to be proved by the estreats into the exchequer. 1 Salk. 285.

So the copy of a decree of tythe in London, has often been given in evidence without proving it a true copy, because the original is lost. Anon.  
1 Vent. 257.

So has a recovery of lands in ancient demesne, where the original is lost; but possession has gone according to the recovery.

2. As

## 2. As to how such a copy is to be given in evidence.

3 Inst. 173.

If a sworn copy is given in evidence, it must be a copy of the whole record; for the precedent or subsequent words may vary the sense and import of the thing produced.

Per Ld. Hard-  
wicke, Canc.  
Sir Hugh  
Smithson's case.  
Bull. N.P. 228.

As in the case of inquisitions *post mortem*, and such private offices in which you cannot read the return without also reading the commission; but in cases of more general concern and notoriety, as the ministers return to the commission in Henry the 8th's time, to inquire into the value of livings, it would be of ill consequence to oblige the parties to take copies of the whole record, as the commission is a thing of such general notoriety, that it requires no proof.

## 2. Of Office-Copies.

Bull. N.P. 229.

As to these a difference is to be observed between office-copies given out by a person intrusted by the court for that purpose, and a copy given by an officer of the court not intrusted for that purpose; the first are evidence of themselves without proof; the latter is not evidence without proving it actually examined; for every credit is to be given to a party appointed by law to a particular trust as far as it extends, but not to others who are not so intrusted.

Bull. N.P. 229.

Therefore the *chirograph of a fine* is evidence of such fine, because the *chirographer* is appointed to give out copies of the agreement of the parties which are lodged of record.

Chettle v.  
Pound.  
P. Ass. 1700.  
Bull. N.P. 229.  
Allen's case.  
13 Car. 1.  
Clayton 51.  
S. C.

But where the *fine* is to be proved with proclamations (as it must be to bar a stranger) the indorsement of the proclamation by the *chirographer* on the back of the chirograph, is not evidence; for though the *chirographer* is authorized by the common law to make out copies of the fines to the parties, yet he is not appointed by the statutes to copy the proclamations; and therefore his indorsement is not evidence.

Bull. N.P. 229.

\* Q. If this should not be further, "on being signed by him, and not proved to be examined," as in such case a sworn copy is evidence, but it must be proved.

Therefore it is not enough to give in evidence a copy of the judgment though examined by the clerk of the treasury, because it is no part of his office; for he is only intrusted to keep the records for the benefit of all men's perusal, not to make out copies of them.

Bull. N.P. 229.

So deeds inrolled by the proper officer are good evidences: aliter where made out by another clerk not so intrusted.—  
*Vid. post.*

.. So of depositions. *Vid. post.*

So a rule of court produced under the hand of the proper 2 Ld. Rsym. officer is good evidence, without proving it a true copy; for 745. it is an original.

And *note*, That when the copy is evidence, the court will Per Pratt, C. J. never order the original to be produced, unless there is a sug- 1 Stra. 307. gestion of a rasure or a new entry.

Therefore where the plaintiff moved that he might have a Brocas v. Mayor copy of the poll, and that Sir J. Ward, who had presided as and Aldermen mayor, might produce the original at the trial; the court re- of London. fused to make such an order, as there was no foundation for it, 1 Stra. 307. and the copy was evidence.

But where a rule was moved for on a justice of peace to Rex v. Smith. produce an examination taken before him at a trial, it was 1 Stra. 126. granted, as it was necessary to prove the hand-writing of the party, in order to make it evidence.

## 2. HOW EACH MATTER OF RECORD MAY BE GIVEN IN EVIDENCE.

1. Of *general acts of parliament*, the printed statute-book Bull. N. P. 225. is evidence; not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are evidence, because they are hints of what is supposed to be lodged in every man's mind already.

But of *private acts of parliament*, the printed statute-book *Ibid.* is not evidence, though reduced into the same volume with the general statutes; but *the party ought to have a copy compared with the parliament-roll*; for they cannot be supposed to be lodged in the minds of the people.

However, a *private act of parliament in print that concerns* Per Holt, C. J. a whole county, as the act of Bedford Levels, for rebuilding Ti- Cal. R. B. temp. 216. ertton, &c. may be given in evidence, without comparing it Gul. 216. with the record: and these things are rather admitted, because Goodright v. Skinner. they gain some authority from being printed by the King's M. 7 G. 2. C. B. printer; and besides, from the notoriety of the subject of Bull. N. P. 226. them, they are supposed not to be wholly unknown: and for this reason printed copies of other things of as public a nature, have been admitted in evidence, without being compared with the original.

So

Dupuy's v.  
Shepherd.  
Caf. K. B. 216.  
S. C. as supra.

So the printed proclamation for a peace was admitted to be read, without being compared with the original record in chancery, in order to prove the day of the peace being concluded.

Rex v. Jefferies.  
1 Stra. 440.

In this case *Keble* and *Rastal's* statutes differed; and they who were for adhering to *Keble*, proved that they had examined him with the parliament roll; the Chief Justice ruled this to be sufficient, and *Keble* was read.

2. As to fines, recoveries, judgments, writs, and affidavits, the law as to those, when the original and when a copy, has been already delivered.

3. As to verdicts, it has been decided,

Lee v. Brown.  
Poph. 128.  
Hard. 112.

1. That if a verdict is offered in evidence, it ought to be proved by the record, and not given in evidence by witnesses; that is, by the record itself, or by an exemplification, according as the case is.

a Roll. Ab. 680.  
Pl. 5.

But if the jury are agreed and discharged without giving a verdict, it is said that it shall be allowed to be given in evidence, that the jury were agreed, in the case of a common person.

Bull. N. P. 243.

So a nonsuit with proof of the evidence, upon which the plaintiff was nonsuited, may be given in evidence on another action brought by the same party.

Cotton v.  
Walter.  
1 Stra. 162.

2. The bare producing of the *posita* is no evidence of the verdict, without showing a copy of the final judgment; for it might have happened that the judgment was arrested, or a new trial granted.

Montgomery v.  
Clarke, 1745.  
Coram Dele-  
gates.  
Bull. N. P. 234.

But this rule does not hold where the verdict has been given on an issue directed out of chancery, because in such case it is not usual to enter up any judgment; and the decree in the court of Chancery is equally proof that the verdict was satisfactory, and stands in force.

Per Pratt, G. J.  
1 Stra. 162.

But the production of the *posita* is sufficient evidence that there was a trial between the parties, in order to introduce an account of what a witness swore at the trial.

Rex v. Hles.  
Sitt. London  
Mich. 14 G. 2.  
Coram Lord  
Raymond.  
Rex v. Minns.  
Sitt. West. Tr.  
32 G. 3. S. C.  
ruled.

As on an indictment for perjury against a witness for what he swore at a trial, the *posita* is good evidence that there was a trial, so as to introduce the words spoken on which the perjury is assigned.

2. OF PUBLIC EVIDENCE, NOT RECORDS.

These come under the general definition, that they must be such as are evidence of themselves, and do not expect illustration from any other thing: such are court-rolls and proceedings in chancery: Of these too, copies may be given in evidence, inasmuch as there is a plain coherent proof; for there is proof on oath of a matter which, if produced, would carry its own light with it, and by consequence would need no proof.

These form the principal heads following: 1st, Proceedings in chancery: 2. In the ecclesiastical, and other inferior courts: 3. Other public matters in the nature of records.

1. OF THE PROCEEDINGS IN CHANCERY.

Proceedings in chancery are not records, for the judgment is there *secundum equum & bonum*, and not *secundum leges Angliæ*; so that they are not the precedents of justice, as not being memorials of the laws of *England*, which bind the chancellor in his determinations. Bull. N. P. 235.

Under this head, I shall consider, 1st, The bill: 2dly, The answer: 3dly, The depositions: and 4thly, The decree.

1. Of the Bill in Chancery, and how far it is Evidence.

1. The bill in chancery is evidence against the complainant; for the allegations of every man's bill shall be supposed true, and as an admission of the fact; for it shall not be presumed that it was preferred by the counsel or solicitor without the parties privity, or that they mingled into it any facts which were not true: but in order to make it evidence, there must be proceedings on it; for if there were none, it should rather be supposed to be filed by a stranger to bar the party of his evidence. Sid. 232. It is said that modern practice is otherwise. Buller N. P. 235. infra.

As if a patron sue the parson on a bond, and the parson prefer his bill in chancery to be relieved, stating it to be a simoniacal contract; the bill and proceedings on it may be given in evidence on an ejectment to make void the parson's living. Bull. N. P. ibid.

“ But where the bill is a mere bill of discovery, it should seem that that would not be evidence.”

Lord Ferrers v.  
Shirley.  
Fitzgibbon 196.

Therefore, on an issue directed out of chancery, to try the validity of a deed, where one *J. N.* was produced by the defendant to prove that he wrote it by the direction of Lord Ferrers in 1720, and to contradict his evidence, the plaintiff produced a *bill of chancery*, filed in 1719 by the defendant, which mentioned the deed; the court would not suffer it to be read, though an answer had been put in; for it was no more than the surmises of counsel for the better discovery of the title: but in all cases where *the matter is stated by the bill as fact*, on which the plaintiff founds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confession.

## 2. Of the Answer in Chancery, and how far it is Evidence.

1. If the bill be evidence against the complainant, much more is the answer against the defendant, because it is given in on oath.

2 Vent. 70.  
Figgleson v.  
Speke  
3 Mod. 239.

But an *infant's answer by his guardian* shall never be admitted as evidence against him on a trial at law; for the law has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath: so the *answer of a trustee* can in no cause be admitted as evidence against his *cestui que trust*.

Ford v. Grey.  
Salk. 286.  
3 Ref.

So though an answer is evidence against the party himself, it is none against his alienee.

Earl of Bath v.  
Batherica.  
5 Mod. 10.  
1 Sid. 418.

2. But in giving an answer in evidence, if it is read as the confession of a party, *it must be taken altogether, and not that part only be read which makes against the party whose answer it is*; for the answer is read as the sense of the party himself; and if you take it in this manner, you must take it entire and unbroken: therefore, if *upon exceptions taken, a second answer has been put in*, the defendant may insist to have that read to explain what he swore in the first answer.

“ But though the whole of an answer must be read when it is produced as evidence, yet it does not of course make that part evidence for the party who made it, which is in his own favour; for he shall be called on to prove the allegations which he so makes in many instances.”

Per Cowper,  
Ch.  
Hill. Vac. 1707.  
Bull. N. P. 237.

As where a bill was filed by creditors against an executor to have an account of the testator's personal estate, the executor set forth by his answer, that he had received from the testator 1100*l.* which had been left in his hands; that on settling

settling accounts with the testator, he gave the testator a bond for 1000l. and that the 100l. remaining was given to him for his trouble in the testator's business, and there was no other evidence respecting this 100l.; it was insisted for the executor, that the answer must be taken together, and that it should be allowed to discharge him, since there was the same rule in equity as at law; but it was answered and resolved, that when an answer was put in issue, *whatever was confessed and admitted need not be proved; but that it behoved the defendant to make out by proofs whatever was insisted on by him by way of avoidance; but that was under this distinction, that where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, that he ought to prove that matter of defence; for perhaps he admitted the fact out of apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth, whatever he says in avoidance: but if it had been one fact (as if the defendant had said the testator had given him 100l.) it ought to have been allowed, unless disproved by the plaintiff, because nothing of the fact charged is admitted, and the plaintiff may disprove the fact if he can.*

“ But where an answer is produced in evidence *on a collateral matter*, not as direct proof of the issue, it may be “ partially read in evidence.”

As where a witness was produced respecting the title to certain lands, and to prove him incompetent, an answer in chancery was produced, in which the witness swore that *he had an annuity out of the land in question*: Serjeant Maynard insisted upon having the whole answer read through; but the court refused it, as it was only produced to prove the witness incompetent, not to prove the issue. *Sparrin v Drax*. M. 27 Car. 2. C. B. at bar. Bull. N. P. 238.

3. “ So an answer is no evidence *for the party* in a court of law, *unless so ordered by the court of chancery in the case of an issue directed out of it*, or unless the other party have made it “ evidence by producing it first.” Bull. N. P. 238.

As where in an issue out of chancery, to try the terms of an agreement which was witnessed by one witness: he being dead before the trial, the plaintiff was under the necessity of producing a bill and answer in the cause, in order to make the witness's depositions evidence; by that means he made the defendant's answer evidence; which was accordingly read for him. *Bourn v Sir Thomas Whitmore, at Salop*. 1747. Bull. N. P. 238.

4. *Voluntary affidavits* are of the same nature nearly as answers in chancery, and may be given in evidence against the person who has made them; but there is this difference: Bull. N. P. 238.

Bull. N.P. 238. That *an answer* which is the defence to a charge in a court of justice, where the defence is on oath, *shall be presumed to be sworn*, as it is proved by shewing the bill and answer.

Smith v.  
Goodier.  
3 Mod. 36.

But a voluntary affidavit which is no part of any cause depending in court (as an affidavit that there were no incumbrances, *ex. gr.*) *must be proved to be sworn*; for proving it *signed by the party*, the proof goes no further than to support it as a letter or note; and *as such* it may be given in evidence without more proof.

Bull. N.P. *ibid.* Another difference is, that *the copy of an answer may be given in evidence*, but the copy of a voluntary affidavit cannot; and the reason is, that the answer is an allegation in a court of justice, and being a matter of public credit, the copy of it may be given in evidence; but a voluntary affidavit has no relation to a court of justice, is a private matter, and not of public credit; and the affidavit must therefore be produced itself as the best evidence; besides, it must be proved to be sworn, which it cannot be unless it is produced.

Chambers v.  
Robinson.  
Tr. 12 G. 1.  
Bull. N.P. 239.

Therefore where in an action for malicious prosecution, the plaintiff offered in evidence to encrease the damages, an office-copy of an affidavit made by the defendant in chancery, of his being worth 2500l. Lord *Raymond* would not let it be read; and the plaintiff was obliged to send for the original into chancery.

“ But in some cases a copy of an answer is not evidence; “ as in the case of an indictment for perjury on it, though in “ all civil cases it is.”

Bull. N.P. 239. For on an indictment for perjury, though a copy may be offered to, and sufficient to warrant the grand jury to find the bill, yet *on the trial the original must be produced*, and positive proof given that the defendant was sworn to it.

Anon.  
3 Mod 116.

But proof that a person calling himself T. S. was sworn, and that he signed the answer, and proof by another witness of the hand-writing, would be sufficient.

Rex v. John  
Morris.  
2 Burr. 1189.

So on an indictment for perjury, an objection was taken “ That there was no proof offered of the identity of the person who swore it, nor even proof that any person at all swore it:” Lord *Mansfield* ruled at the trial, That proof of the defendant's hand-writing, and proof that the master's hand-writing subscribed to the jurat was his, as being sworn before him, was proof sufficient that the defendant was the same person, and that he swore it.



And in the last case, *Ld. Mansfield* mentioned that the reason of the order of the court of chancery "That all defendants should sign their answers," was with a view to the more easy discovery of perjuries in answers: and as to the swearing, that it was sufficient proof of the actual swearing by the person charged, to produce *the jurat attested by the proper officer*, at least sufficient to put the defendant upon proving that he was perjured.

But *no return of commissioners* (or of a master in chancery) *Bull. N. P. 239.* of the parties swearing will be sufficient, without some proof of the identity of the person.

### 3. Of Depositions, and how far they are Evidence.

1. The course of proceedings at law being only by *viva voce* testimony, depositions are only admissible *where the witness who made them is dead*, or cannot be procured; for till then *Godb. 326. Fry v. Wood. 1 Atk. 445.* they are not the best evidence: the nature of the thing is capable of.

"Therefore, in order to make depositions evidence at law, it is necessary to shew that the witness was dead, or could not be procured."

As where on the trial of an issue out of the court of *ex- Benfon v. Olive. 2 Stra. 920.* chequer, the depositions of a witness, taken fifty years before, were offered in evidence, *but without any evidence offered that he was dead*, the party relying on the presumption from length of time, which would entitle a deed of that date to be read: but the *Chief Baron* refused to admit it, though he added, *that had proper search been made and enquiry after the witness*, that he would have admitted the evidence after such a length of time.

2. Depositions may be read in evidence *where the witness has been sought for and cannot be found*; for then he is in the same circumstances as to the party who is to use him, as if he was dead. *Bull. N. P. 239.*

3. Where it is proved that a witness was subpoena'd, and *ibid.* fell sick by the way, his depositions are evidence; for then it is the best evidence that can be had, and answers what the law requires.

4. "Though a witness was uninterested when his depositions were made, if when called upon to give him evidence he is interested, he can neither be heard, nor are his depositions admissible."

Baker v. Lord  
Fairfax.  
1 Stra. 101.

For where in an issue out of *Chancery*, one of the witnesses after his depositions taken became interested, and confessing it on a *voire dire* was rejected; upon which it was moved to read his depositions as if he were dead; but the court refused.

Tilley's case.  
1 Salk. 286.

So where depositions had been taken in *perpetuam rei memoriam*, and the witness who made them afterwards became heir to the lands, and he was now a party to the suit in ejectment, it was held clearly, That these depositions were inadmissible evidence; for the intent of taking the deposition is only to *perpetuate the testimony of the witness in case of his death*.

Rustworth v.  
Countess of  
Pembroke.  
Hard. 472.

5. A deposition cannot be given in evidence against any person who was not a party to the suit, as it is a matter of justice that the party should have the privilege of cross-examining him: Therefore depositions in *Chancery* shall never be given in evidence on an indictment or information, for in these the King is a party, which he was not to the civil suit.

*Ibid.*

Neither can these depositions be read for a stranger against a party to the suit; for as they could not be given in evidence against such stranger, neither shall they be given in evidence for him.

Nor for a stranger to the suit against a purchaser under the party.

Stanley v. Begg.  
Hard. 22.

As in the case of a bill filed by several commoners, for their common which is decreed.

But to this rule there are some exceptions.

Bull. N. P. 239.

1. In the case of customs and tolls.

Bull. N. P. 240.

2. In all cases where *hearsay and reputation are evidence*, depositions in any cause are evidence: for what a witness who is dead has sworn in a court of justice, is of more credit than what another person swears he has heard him say.

Sparrin v. Drax.  
Mic. 27, Caf. 2.  
Bull. N. P. 240.

3. So where a witness in a cause swears to any fact, what that witness has sworn in depositions in another cause, shall be admitted to contradict him.

Per Ld. Kenyon.  
4 Term Rep.  
290.  
1 Chan. Caf 73.  
Sir Martyn  
Nowell's case.  
1 Keb. 146.

4. So in *chancery* it is the usual practice to read depositions taken in one cause as evidence in another, saving all just exceptions—as that they are between other parties.

6. To make depositions evidence, they should regularly *be taken upon bill and answer*, which are proved to have been filed. Howard v. Tremain. 4 Mod. 146.

And it shall be sufficient proof that they were so, by the *fix clerk's book*, mentioning them in the inrollment of the decree, though then lost. 5 Mod. 211.

This is where the depositions are not of a very ancient date, for formerly they did not inroll the bill and answer, and therefore *ancient depositions may be given in evidence, without proof of the bill and answer*; so depositions taken by the command of *Q. Eliz.* upon petition, without bill or answer, were on solemn hearing in chancery allowed to be read. Hob. 112. Bull. N. P. 240.

But though proof of the bill and answer is necessary, in order to make the depositions evidence, yet this is to be taken with some restriction.

“For if a bill is filed, if *the defendant stands out to a contempt*, depositions taken are evidence, for then it is the party's own fault that he did not cross-examine the witnesses: but depositions taken before answer put in, are not admitted to be read, unless the defendant appears to be in contempt; for if there does not appear to be a cause depending, the depositions are considered as mere voluntary affidavits.” Howard v. Tremain, 4 Mod. 147. Sir Th. Raym. 335.

Therefore, where a bill was filed by the devisee, to perpe-  
tuate the testimony of witnesses; the defendant, the heir at  
law, stood in contempt, and would not answer, and thereupon  
the plaintiff had a commission, and examined the witnesses to  
the matter of his bill, *de bene esse*; the defendant joined in the  
commission, and cross-examined some of the witnesses: before,  
however, he put in his answer, some of the witnesses died.  
These depositions were held to be good evidence, as other-  
wise the devisee might lose the benefit of their testimony, as  
the heir would not answer the bill nor call the devise in ques-  
tion, till after the witnesses were dead. Howard v. Tremaine. 1 Salk. 278. 1 Show. 363. S. C.

But if the depositions of witnesses are taken *de bene esse*,  
before the coming in of the defendant's answer, *the defendant*  
*not being in contempt*, such depositions are not evidence, be-  
cause the opposite party had not the benefit of cross-examina-  
tion; and the rule of the common law is strict, that no evi-  
dence shall be admitted, but what is or might have been un-  
der the examination of both parties: but perhaps in chancery,  
on special motion, it might be ordered to be read. v. Brown & alt. Hard. 315.

“ In

" In all other cases it seems that proof must be given of  
 " the bill and answer; that is, proof that a cause was regu-  
 " larly before the court of *Chancery*, upon which the deposi-  
 " tions were taken."

Backhouse v.  
 Middleton.  
 1 Ch. Caf. 175.  
 Smith v. Veale.  
 1 Ld Raym.  
 735.  
 Per Holt.  
 2 Jones 164.

For if a cause be dismissed for irregularity of the complaint, the depositions made in it can never be read, for there was no cause regularly before the court but where the bill is dismissed, because the matter is not proper for equity to decree on; yet depositions on the facts in the cause may be read afterwards in a new cause between the parties.

#### 4. Of the Decree, and how far it is Evidence.

2 Mod. 231.  
 Trowel v.  
 Castle.  
 1 Keb. 21.

A decree in *Chancery*, or the exchequer, may be given in evidence between the same parties, or any claiming under them; for their judgments must be of authority in those cases where the law gives them jurisdiction; and it would be absurd not to suffer what is done by virtue of that jurisdiction to be full proof.

Ibid.

So a decretal order in paper with proof of the bill and answer, or if they are recited in the order, is good evidence.

#### 2. OF THE PROCEEDINGS IN THE ECCLESIASTICAL AND OTHER INFERIOR COURTS.

1st, How far they are evidence: 2d, How they are given in evidence.

Bull. N. P.  
 244.

1 " With respect to these matters, it is in general to be ob-  
 " served, That wherever any court, ecclesiastical or civil,  
 " possesses a competent jurisdiction, the decree, sentence, or  
 " judgment of that court is conclusive evidence of that mat-  
 " ter whenever it arises collaterally in question in any other  
 " court of justice in the kingdom."

Clews v.  
 Bathurst.  
 2 Stra. 960.

Therefore, where the action was for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery, the plaintiff proved the marriage by a parson and a woman; to encounter which the defendant produced a sentence of the consistory court of *London*, in a cause of jactitation of marriage, brought by the supposed wife against the plaintiff, wherein she was decreed free from all contract, and perpetual silence imposed on the plaintiff. This was ruled by Lord *Hardwicke*, *Ch. Just.* to be conclusive evidence; and the plaintiff was nonsuited.

So where the action was on a contract of marriage, and the defendant pleaded *non assumpsit*: On the trial, the defendant offered in evidence a sentence of the spiritual court in a cause of contract, against which the judge had pronounced sentence, and declared Mrs. *Villa Real* free from all contract. The judge ruled this to be conclusive evidence against the plaintiff, who was therefore non-suited.

Da Costa v. Villa Real, 2 Stra. 961.

And it was afterwards ruled in this case, that the sentence was so conclusive, that the judge would not admit evidence of fraud, or collusion in obtaining it.

Prudam v. Phillips, M. 11 Geo. 2. Ibid. in margin.

So in an action of *trover* for goods, judgment of condemnation in the court of exchequer in an information would be conclusive.

Ekins v. Smith. Sir Th. Raym. 336.

2. "But in order to make the sentence of such court conclusive evidence, the question must have come directly before them, and not collaterally; nor shall the sentence be allowed to prove another matter collaterally."

Therefore, if in an information against *A. B.* issue is taken on the fact, whether on such a year *T. S.* was mayor, and it is found that he was not; if another information is filed against *C. D.* and that the same issue joined, the finding and judgment in the last case is not evidence in this.

Bull. N. P. 244.

So where in *trover* for goods, upon evidence, the plaintiff having proved his possession, and the taking of them by the defendant, the defendant shewed that the goods belonged to one *Jane Blackham*, to whom he had administered: The plaintiff then proved, that some days previous to her death, that she had been married to him; it was then insisted for the defendant, that the spiritual court had determined the right to be in the defendant, for they could not have granted administration to him but upon supposing that there was no marriage, and that this sentence being on a matter within their jurisdiction, was conclusive: But *per Holt*, Their sentence is conclusive where it has been directly decided, such cannot be contradicted by evidence; but it is otherwise where a collateral matter is to be inferred from the sentence; such may be examined on evidence.

Blackham's case, 1 Salk. 290.

So where in dower the defendant pleaded *ne unques accouple in loyal matrimonie*; the plaintiff replied, that Sir *William Wolfey* had exhibited a libel in the ecclesiastical court, charging her with having committed adultery with *John Robins*, and praying a divorce; that to that libel she pleaded that she was the wife of *Robins*, and not of Sir *W. Wolfey*; that before the cause was heard *Robins* died, but that afterwards the cause was heard, and the court decreed, That she had been lawfully married

Robins v. Crutchley. 2 Wils. 122.

S. P. Duchefs  
of Kingston's  
case, ruled on  
an indictment  
for polygamy.  
Leach Cr. Cal.  
148.

married to *Robins*: This was on demurrer held to be a bad plea, for the sentence might be by collusion; it was a determination to bind the right of land, to which the defendants nor their ancestors had not been parties; besides, the only mode of trying the validity of a marriage is by the bishop's certificate.

" In this case it is observable, that the point to be ascertained, was the marriage of the plaintiff with *John Robins*, that that was not the direct question before the spiritual court, which was on the adultery; therefore, the question was only collaterally decided, and therefore could not be conclusive: but it is there said, That if it had come directly in question on the bishop's certificate, that that would be conclusive."

Crofts v. Salter.  
3 Term Rep.  
639.

3. But the sentence of the ecclesiastical court, in order to be decisive, must be positive ascertaining the right: For where in case for disturbing the plaintiff in a pew, it appeared that upon a libel in the consistorial court, the court had adjudged the right to be in the plaintiff; but that on an appeal to the arches, *that court had reversed the former sentence*: it was held, That this was not conclusive evidence for the defendant.

Bull. N. P. 245.

Therefore in dower, if the defendant plead *ne unques accouple, &c.* and the bishop certifies on this issue that the parties are married, and such certificate be inrolled, and judgment given for the demandant thereon: *In the like action against another tenant, the defendant will be concluded from pleading in the like plea*; for the matter having been *ex directo* determined between the parties, so that it can never be again controverted by them, the record is conclusive evidence of such fact against all the world.

Saloucci v.  
Johnson, ante  
145.

4. " And courts take the same notice of the adjudications of *foreign courts* in matters of which they have cognisance, and hold the sentences of such courts conclusive evidence; nor will the courts here examine into the grounds of their decision, if the matter appears to be within their jurisdiction."

2 Show. 232.  
Barzillay v.  
Lewis.  
ante 145. S. P.

As in an action on a policy of insurance, with a warranty that the ship was *Swedish*, a sentence of the French court of Admiralty, condemning the ship as *English* property, was held to be conclusive evidence.

Burton v.  
Fitzgerald.  
2 Stra. 1078.

5. " But in order to make the proceedings in the inferior courts conclusive evidence, such courts should have complete jurisdiction of the whole matter which is the object of the cause."

" There-

" Therefore, if the suit is in the ecclesiastical court, if it is mixed with any matter of temporal cognizance, there the sentence is not conclusive evidence."

Therefore, if a man devise *lands*, the probate of the will in the spiritual court cannot be given in evidence; for all the proceedings there as far as relate to land are *coram non iudice*: For having no authority to authenticate any such devise, a copy of a will under their seals is no evidence of a true copy. 1 Roll. Ab. 678. Bull. N. P. 245.

But the probate of the will of *personal estate* is good evidence, because they have the custody of all wills that concern personal estate, and they are the records of that court, and therefore a copy of them under the seal of the court must be good evidence; and this is still the more reasonable, because it is the use of the court to preserve the original will, and only give back to the party copies of it under the seal of the court.

But to this are the following exceptions:

1. " Where the party who wants to use the will of lands in evidence cannot procure it, in such case the ledger-book is evidence."

As where in an avowry for a rent-charge the avowant could not produce the will under which he claimed, *as it belonged to the devisee of the land*, who was the plaintiff in the action: in such case it was held admissible evidence, and sufficient to charge the plaintiff to produce the ordinary's register of the will, and to prove former payments. Anon. Cal. K. B. Rep. Gul. 246.

*Sed quære*, If according to modern practice the plaintiff should not have had notice to produce it?

2. " Where a will of lands is wanting to prove a collateral matter, as a descent, *ex. gr.* in such case the ledger-book of the ordinary is evidence."

As if it was necessary to prove the relation of father and son, in such case the ledger-book would be evidence: for the ledger-book is not merely a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, in such case the rolls of the spiritual court that has authority to inroll all wills, are sufficient proof of such testament. Dike v. Polhill. Ld. Raym. 744. Pettit v. Pettit. 1701. Bull. N. P. 246.

But a copy of the ledger-book is not evidence.

Bull. N. P. 246.

6. On this head it is further to be observed,

" That

"That where any inferior or other court has complete jurisdiction, and that their sentence, decree, or judgment is final, *such decree, sentence, or judgment shall be conclusive and final in any other court of concurrent jurisdiction.*"

Hutchinson's case. temp. Car. 2 quot. Show. 6.

Therefore, where the defendant having killed a man in *Spain*, was there prosecuted, tried, and acquitted, and afterwards was indicted here, it was held, That he might plead that acquittal in *Spain* in bar; because the final determination of a court of competent jurisdiction, is conclusive to all courts of concurrent jurisdiction.

Bull. N. P. 245.

So, as before-mentioned, in cases of *Dower*, upon which the bishop has once certified marriage, *that shall in every other case be conclusive*, because that is the proper jurisdiction by which it is tried.

"But this rule is confined to cases of concurrent jurisdiction only."

Boyle v. Boyle. 3 Mod. 164.

For though a conviction in a court of criminal jurisdiction is conclusive evidence of the fact in a court of civil jurisdiction, yet *an acquittal is no proof of the contrary*; as if the father was convicted on an indictment for having two wives; this would be conclusive evidence in ejectment, where the validity of the second marriage was disputed: But an acquittal would not prevent the party from giving evidence of the former marriage so as to bar the issue of the second, for an acquittal ascertains no fact as a conviction does; nor would a conviction be conclusive so as to bar the party in a writ of dower, or in an appeal where the legality of the marriage comes in question: however, it would be evidence before the bishop on the issue of *ne unques accouple*; for though the fact of the marriage be not conclusive evidence of the legality of it, yet it is *prima facie* a proof of it.

Lord Howard v. Lady Inchiquin. 1700. Bull. N. P. 285.

Thurston v. Slatford. Salk. 284.

7. *A record of the sessions* in which his admission was entered, is good evidence to prove that a public officer had not taken the oaths by which he forfeited his office.

## 2. As to how these Matters are to be given in Evidence.

1. We have observed before in what cases the original will must be produced, and in what cases the probate.

Morse v. Roach. 2 Stra. 961.

As it often happened that the will concerned both personal and real estate, in which case the ecclesiastical court had a right to the custody, on account of the personalty, before the year 1718 the method was to deliver out a will of land,  
to



to be proved at trials *on security being given*; but after that the registers refusing to deliver it, but attending with it themselves, and making exorbitant charges for their attendance, the court in this case ordered it to be delivered out on security. However, the present practice is for an officer of the commons to attend with it.

2. The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted; therefore where a lessee pleads an assignment of a term from an administrator, such certificate is good evidence: so would the book of the ecclesiastical court, wherein was entered the order for granting administration: so would the copy of the probate of the will be evidence that S. S. was executor; but a copy of the will would not be evidence of it.

Hempton v. Croft.  
Ed. 8. Geo. 2.  
K. B.  
Bull. N. P. 246.  
Garrett v. Lyfter.  
1 Lev. 25.  
Smartle v. Williams.  
Cit. Hardw. C. 1bid. N. P. 246.  
Noell v. Wells.  
1 Sid. 339.  
Raym. 405.

3. Though in a suit relating to the personal estate, the probate of the will under the seal of the ecclesiastical court is sufficient evidence, yet the adverse party may give in evidence that the probate is forged, because such evidence supposes that the spiritual court has given no such judgment, and so there is no reason that the spiritual court should be concluded by it: but it cannot be given in evidence that the *will was forged*, because the ecclesiastical court have decided, by granting the probate.

So the adverse party may prove that the testator left *bona notabilia*, against the probate by an inferior court; for in that case the inferior court had no jurisdiction, as the administration should be a prerogative one.

So if letters of administration are shewn under seal, you may give in evidence *that they were revoked*; for this is in affirmation of the proceedings in the spiritual court, and does not controvert the propriety of their decision.

So neither can it be given in evidence that the testator was *non compos*, for that the spiritual court have power to decide, and have decided by granting probate, and that is conclusive.

### 3. OF OTHER PUBLIC MATTERS IN THE NATURE OF RECORDS.

1. *The rolls of a court-baron* are evidence, for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the manor-court, which was anciently a court of justice, relating to all property within the manor.

So

Doe ex dim  
Goodwin v.  
Spray.  
1 Terr Rep.  
466.

So when the question was respecting the mode of descent of certain copyhold lands, a *customary was produced in evidence by the steward of the manor, as the customary of the manor*: He had received it from his predecessor in 1748, and he had received it from his; it was of great antiquity, and handed down along with the rolls of the manor, *but it was not signed by any person* to evidence its origin or authenticity: the court held nevertheless, That under the circumstances under which it had so been transmitted, joined to its antiquity, that it was good evidence.

Snow v.  
Cutler & alt.  
1 Keb. 567.  
Comb. 138.  
Rex v. Jevins,  
Comb. 337.  
12 Mod. 24.

And a copy of a court-roll under the steward's hand, is good evidence to prove the copyholder's estate.

So an examined copy of the court-roll is good evidence, if sworn to be a true one.

Bull N. P. 247.  
Salk 221.

2. The *register of christenings, marriages, and burials* is good evidence, or the copy of it: And it is said that *proof viva voce* of its contents, without a copy, has been held good evidence: but *Just. Buller* doubts it, as it certainly is not the best evidence that the nature of the thing is capable of.

"And it seems that books of that public nature shall be conclusive evidence of the matters of which they are proper registers."

Muy v. May.  
2 Stra. 1073.  
Trial at Bar  
before Page,  
Probyn, & Lee,  
Just.

For where on question concerning the plaintiff's legitimacy, he produced the general registry of the parish wherein he was registered, as the son of his father and mother, in the same way that lawful children are entered. This registry, the clerk said, was made from a day-book, from which the entries were made in this register once in every three months; and the entries were made in the day-book immediately after the christening, or next morning. To encounter this, he was asked by the defendant if any notice was taken of bastards? he said, their method was to add *B. B. base-born*. The defendant then offered the day-book from whence the other entry was posted, in which *B. B.* was inserted; and they insisted that this was the original entry. This was opposed: the opinion of the court was taken; *Just. Page* was for admitting it, but the two other judges were against it; saying, the other was the only register, and there could not be two registers in one parish; so it was rejected.

Per Cur.  
1 Stra. 93.

3. *Corporation-books* are good evidence where they are publicly kept as such, and entries made by the proper officer; or if that officer be dead, or sick, or refuses to attend, entries made by other persons may be good; but these matters must appear; and when the book is produced it must be established.

But where in a case of *quo warranto*, a book was produced which appeared to be only minutes of some corporate acts ten years before, *all written by the prosecutor's clerk, who was no officer of the corporation*; this was opposed, on the ground that it never was kept among or esteemed one of the corporation-books, in which the entries were all made by the town-clerk; and there being some suspicion respecting the book, the judge, before he would admit it, required an account by whom it had been kept for the ten years? and whether any body had seen it before? which the prosecutor not being able to satisfy him in, the book was rejected.

Rex v. Motherfell.  
1 Stra. 93.

So where the question was, Whether *A. B.* at the time he did a corporate act was an out-burges or not? and to prove it, the defendant who had a rule to inspect, and take copies of all the books and records of the borough, produced a copy of a letter fifty years old, and found in one of the corporation-chests, wherein *A. B.* was mentioned to be of another place: The court refused to admit it to be read, for it was not a corporate act within the rule; so that a copy was not evidence; but the original should itself be produced.

Rex v. Gwin  
Mayor of Christ Church  
1 Stra. 401.

4. If the question be, Whether a certain manor be ancient demesne or not? the trial shall be by *Doomsday-book*, which will be inspected in court.

Anon.  
Hob. 188.

In ejectment for the manor of *Artam*, the defendant pleaded ancient demesne, and when *Doomsday-book* was brought into court, would have proved that it was anciently called *Nettam*, and that *Nettam* appeared by the book to be ancient demesne; but he was not permitted to give such evidence; for if the name was varied it ought to have been averred on the record.

Gregory v. Withers.  
Hill. 28 Car 2.  
Bull. N. P.  
248.

5. There is in the *exchequer* a particular survey of the King's ports, which ascertains their extent; this therefore is good evidence on a question respecting their limits, or whether a thing be done in or out of the ports.

Bull N. P.  
248.

6. The rolls, or ancient books of the heralds' office, are evidence to prove a pedigree; but an extract of a pedigree taken out of their records shall not; for it is not the best evidence in the nature of the thing, and a copy of the records might be had.

Salk. 281.  
2 Jones 224  
Bull. N. P.  
248.

So where the question was, Whether the lessor of the plaintiff was heir at law to him that last died seised? to prove the pedigree, the Chief Justice admitted a visitation in 1623, made by the heralds, entered in their books, and kept in their office, to be read in evidence; he also admitted a minute-book

Pitton v. Walter.  
1 Stra. 161.

book of a former visitation, signed by the heads of the several families, which was found in Lord *Oxford's* library.

Downes v.  
Mooreman.  
Bunb. 160.

So the copy of an old agreement where the original was in the *Bodleian* library, from whence the *Oxford* statutes prohibit it to go out, was held good evidence.

Ex dim. Whitcomb v —  
P. 6. Ann C. B.  
Bull. N. P. 249.

7. *The register of the navy-office*, with proof of the method there used to return all persons dead with the mark *D. D.* is good evidence of the death of any person.

Robert  
Rhodes's case.  
Leach's Cr.  
Cas. 23

So on an indictment for forging a seaman's will, *the muster-book of the navy-office* is good evidence to prove the identity of the supposed testator.

Vicar of Kel-  
lington v.  
Matter and  
Fellows of  
Trinity College  
Cambr. & alt  
1 Will. 170.

8. *An ancient survey from the first fruits office* of the possessions belonging to a nunnery, which survey was taken in the year 1563, upon the dissolution of the monasteries, *tempore Hen. 8.* respecting the endowment of a vicarage, though it did not appear by what authority that survey was taken, was held to be good and sufficient evidence.

Palm. 38.

9. *The Pope's bull* is evidence upon a *special prescription* to be discharged of tithes, as to prove that such lands belonging to such a monastery, were discharged at the time of the dissolution, for then they continue discharged by the act of parliament of *Hen. 8.*; but it is no evidence on a *general prescription* to be discharged, because there appears a commencement of such a custom, and a general prescription is, that there was no time or memory of the thing to the contrary.

Palm. 527.

So *the Pope's licence* without the *King's*, has been held good evidence of an impropriation, because anciently the *Pope* was holden as supreme head of the church, and therefore to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard to the *King*; and these ancient matters must be judged according to the error of the times in which they were transacted.

Bull. N. P.  
248.

10. *An old terrier or survey of a manor*, whether ecclesiastical or temporal, is good evidence; for there is no other way of ascertaining old tenures or boundaries.

Anon.  
1 Stra. 95.

But a *survey made by one party without the privity or concurrence of the other*, is not admissible evidence.

Buller N. P.  
Ibid.

So a *terrier of glebe* is not evidence for the *parson*, unless signed by the churchwardens as well as by the *parson*; nor then if they are of his nomination: and though it be signed by them, it deserves very little credit, unless it be also signed by the substantial inhabitants; but in all cases it is strong evidence against the *parson*.

11. *A general history* may be given in evidence to prove a matter relating to the kingdom in general, but not to prove a particular right or custom; therefore in the case of *St. Catherine's Hospital, Ch. Justice Hale* allowed a chronicle to be evidence of a particular point of history in *Edw. 3d's* time: so a year-book is evidence of the practice of the court; therefore *Cambden's Britannia* being produced to prove a right respecting the digging of salt-pits at *Nantwich*, it was rejected. Rex v. Burgess of Droitwich. Salk. 28.

So where the question was, If it was an inferior abbey? *Dugdale's Monasticon* was refused, as the original records were in the augmentation-office.

12. The certificate of the commissioners for stating the army-debts is conclusive evidence, nor can the party be admitted to impeach or disprove it by evidence. Moody v. Thurston. 1 Stra. 481.

But in such case the certificate must be made by them sitting as commissioners; for where it had been signed by them at their own houses and apart, it was rejected. Mountcan v. Wilton. 1 Stra. 568.

13. *An inventory taken by the sheriff on an execution*, is evidence between strangers, to prove the quantity and value of the goods; for the law intrusting him with the execution, must trust him throughout. Baxter v. Seex & al. 2 Keb. 277.

14. In an indictment against a prisoner for returning from transportation before the term of it expired, it was necessary to prove the precise day on which the prisoner had been discharged from *Newgate*: to prove it the *daily book, kept by the clerk of the papers*, containing entries of the names of the prisoners when brought in, and when discharged, was held to be good evidence; though it appeared that the entries were made partly from the information of the turnkeys, and partly from their indorsement of the writs, and not from the clerk of the papers own knowledge; for being things of a public nature, credit was to be given to them till it was impeached. Aickle's case. Leach Cr. Cal. 330.

15. It is a general rule, that *depositions taken in a court not of record*, shall not be allowed in evidence elsewhere: so it has been holden in the case of depositions in the ecclesiastical court, though the witness is dead. 2 Roll Ab. 679. Litt. Rep. 167.

“ And the rule seems to be general, that except when provided for by general statutes, that the depositions of witnesses on oath are not evidence, unless the parties to be affected by it have had the benefit of cross-examination, even though such witnesses could not be produced in person.”

Rex v. Paine.  
1 Salk. 281.

Therefore in an information for a libel against government, and not guilty pleaded, the *Attorney General* offered in evidence *depositions taken before a justice of the peace*, relating to the fact, the deponent being dead, &c. *Per Cur.* Upon advice with the justices of the Common Pleas, depositions taken before a justice of peace, if the deponent die, may be made evidence by stat. 1 & 2 P. & M. 13. but it extends only to the case of felony, not to this case.

"This was the doctrine held by Lord *Kenyon* and *Just. Grose* in the following case; *Justices Aburft* and *Buller* dissent."

Rex v. Eriswell  
3 Term Rep.  
707.

A pauper then residing in the parish of *Icklingham*, where it was apprehended he was not settled, was taken up by the parish-officers of that parish, and brought before two justices for the purpose of being examined concerning his settlement; in consequence of which he was examined, and his examination signed by himself before the justices; but no removal then took place: he continued to reside in *Icklingham* for some years, when he became insane, and the question was, Whether the examination so taken was evidence or not? when the court were equally divided on the question.

But to this rule are the following exceptions:

1. By statute 1 & 2 Ph. & M. 2 & 3. & Ph. & M. 10. "Justices of peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these examinations shall be read against the offender upon an indictment if the witnesses be dead."

Westbeer's case.  
Leach.  
Cro. Car. 14.

And where an accomplice had made a full confession in writing, and given information upon oath against the prisoner, before Lord *Ch. Just. Lee*, pursuant to 1 & 2 Ph. & M. 2 & 3 Ph. & M. but before the prisoner was brought to trial the accomplice died: it was adjudged, That the depositions so taken were admissible evidence.

2. By stat. 5 Geo. 2. c. 30. s. 41. "The depositions before commissioners of bankrupt are ordered to be recorded, and that copies of such record of the depositions shall and may be given in evidence to prove such commission, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters and things when the witness is dead."

Janfon assig. of  
Burton v. Wil-  
son. Doug. 224.

And depositions so taken and recorded, are good and admissible evidence to prove the precise time when an act of bankruptcy was committed.

3. If the *witnesses examined on the coroner's inquest be dead or beyond sea*, their depositions may be read, for the coroner is an officer appointed on behalf of the public to make enquiry about the matters within his jurisdiction, and therefore the law will presume the depositions before him to be fairly and impartially taken. Bromwick's case.  
1 Lev. 180.  
2 Jones 53.

4. Analogous to depositions is the evidence before given by a witness: as to which it has been decided, That in courts of law, the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim; as was agreed on all hands at a trial at bar in *Lord Palmerston's case*; but in such case it is not sufficient to swear to *the effect of the words used* by the witness at the former trial, but the words themselves ought to be given. Per Ld. Kenyon.  
4 Term Rep.  
290.

So where a witness was sworn at a trial at bar in *C. B.* between the same parties, and on the same issue; and on a second trial he was subpoena'd by the defendant to appear in *K. B.* and his charges given to him; but he not appearing, persons were admitted to swear what he swore in *C. B.*, for the court said, That they would presume that he was kept away by the practice of the plaintiff; which supposition was strengthened by his having been produced by the plaintiff on the first trial. Green v. Gatewick.  
Mic. 24 Car. 2.  
Bull. N. P. 243.

## 2 OF PRIVATE WRITTEN EVIDENCE.

This is 1st, Deeds: 2. Other inferior written evidence.

### 1. OF DEEDS.

1. As to what matters deeds are evidence: 2dly, How they are to be given in evidence to the jury.

#### 1. As to what Matters Deeds are Evidence.

1. "Where any person claims by a deed in the pleadings, he must make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be produced." Bull. N. P. 249.

For in every contract there must be apt words to shew what rights are transferred, and to whom; and the sense and signification of these words must be expounded by the law; there must therefore be a profert of all solemn contracts: 1. For the security of the subject, that what right is transferred may be adjudged of according to law: 2. Because all allegations in a court of justice must set forth the thing demanded;

and the thing there demanded cannot be set forth without shewing the instrument upon which the demand arises.

Bull. N. P. 249. "But where a man shews a good title in himself, under the deed, every thing collateral shall be intended, whether it be shewn or not; and that matter is collateral which does not enter into the essence or being of a title, but arises *aliunde*; so that there may be a derivation of title without it."

Sir Humphry Ferrers v. Wignall. Cro. Elis. 400. As where in trespass the defendant justified taking the beat in question as an heriot, as servant to *John Ardern*, who had been enfeoffed of the lands by *St. Leger*, and shewed the custom so of taking: it was demurred for cause, That the defendant entitled *John Ardern* as a purchaser by feoffment, and shewed not the attornment of the tenant; but it was overruled, for the court said, That it should be intended.

Co. Litt. 267. 10 Co. 92. Neither can *privies in estate* take any advantage of a deed without shewing it: as if there be tenant for life remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without shewing the deed; for since the right passes merely by the deed, to say that a person is released without shewing the deed, would not be a good plea.

Bull. N. P. 250. 2. "But as to the cases in which a deed is necessary in evidence, a distinction is to be observed between things *lying in grant*, and things *lying in livery*; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shewn."

2 Roll Ab. 682. As to things that lie in livery, a man may plead that *I. S.* enfeoffed him, without saying "by indenture," and yet give the indenture in evidence, because the feoffment is made by the livery, and the indenture is only evidence of such feoffment; but if a man plead that *I. S.* enfeoffed him by deed, it may reasonably be doubted whether he can give a parol feoffment in evidence, because he has bound himself up to a feoffment by deed.

Bull. N. P. 251. And though since the statute of frauds, the ceremony of livery only is not sufficient to pass an estate of freehold or term of years, but there must be a deed or note in writing, yet it is not necessary to set out such conveyance in the pleadings, for they are as they were formerly *to be proved by demurrer*.



2. As to things that lie in grant.

These are incorporeal rights, as fairs, markets, advowsons, Co. Litt. 225. and rights to land where the owner is out of possession; and as they cannot visibly be delivered over, therefore they must pass by the next sort of conveyance that holds the second place in point of solemnity; that is, by grant under the hand and seal of the party.

If a person claims any thing lying in grant, he must shew Dr. Leyfield's his deeds, or otherwise he must prescribe in the thing he pre- case. tends to, and the prescription being supposed immemorial, 10 Co. 92. supplies the place of a grant.

3. He that has a *particular estate by agreement of the parties*, 10 Co. 93. a. must shew not only his own conveyance, but the deeds paramount; for there can be no title made to a thing lying in agreement but by shewing such agreement up to the first original grant.

But where a person claims any *particular estate by act* of 10 Co. 94. law, he may make claim without shewing the deeds; as tenant in dower, or by elegit, or guardian in chivalry, may claim an estate in a thing lying in grant, without shewing the deed; for where the law creates an estate, and does not give the particular tenant the property of the deeds, it must allow the estate to be demanded without them.

So he may plead a *condition without shewing the deed*, because Co. Litt. 225. he claims an estate by act of law, and therefore is not estopped by the act of livery; and therefore he may claim an estate defeated by the condition without deed.

But a *tenant by the courtesy*, though he is in by operation of 10 Co. 94. law, cannot claim any estate lying in grant without the deed, because he has the property in and the custody of the deeds in right of his wife; which property cannot be divested out of him during the continuance of his estate.

So also he cannot defeat an estate of freehold without shew- 1bid. ing the deed, for the act of livery is an estoppel that runs with the land, and bars all people to claim it by virtue of any condition, without the condition appear in the deed; and since he has the custody of the deed, he must shew it.

But where a man has not the custody of the deed, as where 1bid. the mortgagee makes a lease, and after, the mortgagor re-enters; in which case the lessee has not the custody of the deed: in that case he is not compelled to shew it.

Co. Litt. 226. 4. As no party shall take advantage of his own negligence  
 Bull. N. P. 253. in not keeping his deeds, which in all cases ought to be fairly  
 produced to the court, so his adversary shall not take any ad-  
 vantage of his violent detaining them; for the one, by the  
 violent taking away of the deeds, gives to the other a just  
 excuse for not having them at command, and no man can  
 take advantage of his own injury; and therefore it is a good  
 plea for one party to say, "*That the other entered, and took  
 away the chest in which the deeds were.*"

## 2. Of giving Deeds in Evidence to the Jury.

Bull. N. P. 254. As to this, the general rule is, 1. That the deed itself must  
 be given in evidence, and 2. That it must be proved by one  
 witness at the least: for *delivery* being essential to a deed, it  
 must be proved; and it is not sufficient only to prove the  
 party's hand-writing subscribed,

1 Mod. 94. But there are some exceptions to this rule.

1. If after notice the opposite party refuse to produce it, *a  
 copy will be good evidence*; but such copy ought to be proved  
 by a witness who has compared it with the original, for other-  
 wise there is no proof that it is a true copy.

1 Keb. 117. 2. For the same reason where a will remains in chancery  
 by the order of the court, a copy may be given in evidence,  
 because the original is not in the power of the party.

10 Co. 92. 3. So where it is proved that the deed itself is lost *by fire*,  
 Thurston v De- a copy may be given in evidence; but perhaps in such case,  
 lahay, Hereford if it came out in evidence that there were two parts executed,  
 Ass. 1744. and the loss of one only was proved, a copy would not be  
 Bull. N. P. 254. evidence: so if it were proved that the deed came into the  
 Pritchard v. hands of the defendant's brother, under whom the defendant  
 Symonds, claims, a copy ought not to be read, even though the defend-  
 Hereford 1744. ant has sworn in an answer in chancery that he had not got  
 Bartlett v. the original.  
 Gawler.  
 Tr. 14 G. 2.

K. B.

Bull. N. P. 254.

Stile 205.

And in these cases, if the party has no copy, he may pro-  
 duce an abstract; nay, give parol evidence of the contents;  
 and where possession has gone along with a deed many years,  
 the original of which is lost or destroyed, an old copy or ab-  
 stract may be given in evidence, without being proved to be  
 true, because in such case it may be impossible to give better  
 evidence.

Ford v. Grey.

Salk. 283.

4 Ref.

A recital of a lease in a deed of release is good evi-  
 dence of such release against the releasor, and those that  
 claim

claim under him; but as to others it is not, without proving there was such a deed, and that it was lost or destroyed.

2. As to the second part of the rule, that *the deed must be proved by one witness* at least, it is to be observed,

1. That where a deed is in the hands of the opposite party, *Rex v. Middle-* and he has notice to produce it and does so, *it is to be admitted* 207.  
*in evidence without proof of the execution of it*; for being in the hands of the opposite party, it cannot be known who the sub-<sup>2 Term Rep. 41.</sup>scribing witnesses were, and so the party cannot be prepared to prove it.

2. But to this rule are exceptions.

1. As where a witness to a deed, being subpoena'd, did not appear; but to prove it the party's deed, they proved an indorsement, reciting a proviso within, that if he paid such a sum the deed should be void; and acknowledging that the sum was not paid, and by the indorsement he expressly owned it to be his deed: upon this it was admitted to be read. *Case K. B. 500.*

2. It has been holden, That a deed to lead the uses of a fine or recovery may be read without proof of its being executed; the reason of which seems to be, that by the fine being levied, it appears the parties intended to convey the land to some use or other, and therefore the law will admit of slight proof to shew what use was intended; since the slightest proof without other to contradict it, will turn the presumption on that side: and therefore though the counterpart of a deed be not evidence in other cases, yet it has been holden so in the case of a fine and recovery; however, in a case reserved from *Hereford* assizes by Mr. *Just. Fortescue*, all the judges were of opinion, That such a deed to lead the uses of a fine must be proved; and therefore it seems as if the above case and that in *Salkeld* were not law. *Glascock v. Sir Wm. Warren. Hill. 12 G. 3. Bull. N. P. 255.*  
*Anon. Salk. 287.*  
*Griffith v. Bull. N. P. 255.*

3. It has been said, That a deed of bargain and sale inrolled, may be given in evidence without proving the execution of it, because the deed by law requires inrollment, and therefore the inrollment shall be evidence of the lawful execution of it; but that where a deed needs no inrollment, there, though such deed be inrolled, the execution of it must be proved; because since the officer is not intrusted by the law to inroll such deeds, the inrollment will be no evidence of the execution, and the cases in the margin are cited in support of the doctrine: however, it is said by *Just. Buller (N. P. 255.)* that the law may well be doubted, notwithstanding that deeds of bargain and sale inrolled have frequently been given in evidence at *Nisi Prius* *5 Co. 54. Stile 445. 1 Keb. 117. Salk. 280.*

*Prius* without being proved; and in support of the practice the case of *Smartle* against *Williams*, in *Salkeld*, is relied on; but that case is wrongly reported; for it appears by 3 *Leo.* 387, that the acknowledgment was by the bargainor, and so it is stated in *Salkeld*, MSS.; besides, it appears from both the books that it was only a term that passed, and so it was no inrollment within the statute.

1 Sid. 269.

4. A deed may be given in evidence on a rule of court by consent, without being proved; for the consent of the parties is conclusive evidence, as the jury are only to try those matters wherein they differ.

Goodright ex  
dim. Walling-  
ford v. Weston.  
Per Willes,  
C. J.

5. The deed of a corporation need only be proved to be under the corporation-seal; and there is no occasion for signing or attestation, proof of the seal is sufficient.

Abington Sum.  
Aff. 1754.  
MSS.  
2 Roll Ab. 132.  
Bull. N. P.  
256.

6. Though a deed of feoffment be proved to be duly registered, yet it is not sufficient to convey a right, *unless livery of seisin be likewise proved*; however, where the deed is proved, and possession has always gone according to it, livery shall be presumed; but if possession has not gone along with the deed, the livery must be proved; for since livery is to give possession on the deed, where there is no possession, the presumption is, that there was no livery, and consequently it must be proved, to encounter the presumption; but if the jury find a deed of feoffment, and that possession has gone along with the deed, yet, unless they expressly find a livery, the court cannot adjudge it a good conveyance; for they are only judges of what is law, and have nothing to do with any probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee.

7. Where a deed is by law to be inrolled, as deeds under stat. 27 H. 8. c. 6.; so of dutchy leases with the auditor: in such cases the indorsement by the proper officer in the usual manner, on the back or in the margin, is always admitted as good evidence of the inrollment.

Bull. N. P.  
255.

8. Deeds of thirty years standing may be given in evidence, without proof of their execution. In what cases *Vid. ant.* fol. 259.

## 2. OF INFERIOR WRITTEN EVIDENCE.

1. "The books of third persons are good evidence as to any transaction to which they immediately refer."

Per Yates, Just.  
Timmins v.  
Waugh, Wor-  
cester Lent Aff.  
1765. MSS.

In an action concerning tithes, the books of a rector or vicar who was dead, was admitted as good evidence; for as he had no interest but for his life, it could not be presumed that

that he would make any entries that were false, merely for the benefit of his successor, who might be an utter stranger to him; and therefore not like the case of the owner of an estate, who might be presumed to have a partiality for his own family, who were to succeed him.

So in this case, where the question was if the mortgage-money was really paid? a *scrivener's book of accounts* (the scrivener being dead) was holden to be good evidence of payment. Smartle v. Williams, cited per Lord Hardwicke in *Montgomery v. Turner*, 1754. Bull. N. P. 283.

So where a question arose respecting the surrender of a tenant for life, which was necessary in order to establish a recovery which had been suffered: to prove that fact, the debt-book of a Mr. Edwards, an attorney at Bristol, who was then dead, was offered in evidence; in which book was a charge made by him of 32l. for suffering the recovery in question; and two articles of it were for drawing the surrender in question twenty shillings, and engrossing two parts, twenty shillings more; and it appeared from the book that this bill had been paid: it was held to be admissible and good evidence. Warren ex dem. Webb v. Green-ville. 2 Stra. 1122.

2. "So the party's own books are good evidence against him."

In an issue out of chancery to try whether eight parcels of Hudson's Bay stock, bought in the name of Mr. Lake, were in trust for Sir Stephen Evans: the plaintiffs, his assignees, shewed first that there was no entry in the books of Mr. Lake relating to this transaction: 2dly, Six of the receipts were in the hands of Sir Stephen Evans, and there was a reference on the back of them by Jeremy Thomas (Sir Stephen's book-keeper) to the book B. B. of Sir Stephen Evans: 3dly, Jeremy Thomas being proved to be dead, the question was, Whether the book of Sir Stephen Evans (referred to, in which was an entry of the payment of the money) should be read? and the court of King's Bench at a trial at bar, admitted it not only as to the shares, but also as to the other two in the hands of Mr. Biby Lake, the son of Mr. Lake. 3 May, 1738. Bull. N. P. 282.

So if I. S. seized of two manors, A. and B. and he cause a survey to be taken of B. and afterwards conveys it to J. N. and afterwards disputes arise concerning the boundaries of the two manors, this survey is good evidence: *aliter* if the two manors had not been in the same hands when the survey was made. Lord Raym. J. N. 784.

3. "A receipt is *prima facie* and presumptive evidence to charge the party with so much money received; but it is not conclusive evidence."

For

Stratton v.  
Rafal.  
2 Term Rep.  
366. and case.  
ibid.

For where the defendant, together with one *Auaru*, signed a receipt acknowledging to have received the sum of 57*l*. being the consideration-money of an annuity: the annuity afterwards being void, and an action brought for the money, it was held, That the defendant might shew that he was only the surety, and had not received any part of the consideration-money, notwithstanding the receipt; and having done so, he had judgment.

Ruffel v. Boheme.  
2 Stra. 1127.

4. To prove property in a cargo, in an action on a policy of insurance, the plaintiff produced a *bill of parcels* of one *Gardiner at Petersburg*, with his receipt to it, and proved his hand: it was objected, That this was no evidence against the insurers; but the Chief Justice (*Lee*) admitted it.

5. "The *Gazette* is good evidence, and in general sufficient notice as to matters published in it."

Gowram v.  
Hope & alt.  
Sitt. at West.  
after Mic. 1792.  
MSS.

But where in an action for goods sold and delivered against three partners, one let judgment go by default, and two of them set up a defence, That the partnership had been dissolved before the goods were furnished which had been delivered to the third, and that notice of the dissolution of the partnership had been inserted in the *London Gazette*, *Ld. Kenyon* said, That that alone was not sufficient, but that particular notice by letter or message should be given beside to all persons who had any transactions with the firm.

6. Notes of hand and bills of exchange also rank under this head; of which I have already treated at length.

Biggs v. Lawrence.  
3 Term Rep.  
454.

7. *A letter from an agent* acknowledging the receipt of goods, is good evidence against the buyer.

*Note*, It is however to be observed in general, that most instruments, whether of a public or private nature, now usually given in evidence, are by several statutes required to be *stamped*; without which they cannot be admitted.

1. "That *each instrument* to which a stamp is required, "must, if given in evidence, be properly stamped."

Rex v. Reeks.  
2 Stra. 716.

For where in a *quo warranto* for usurping the office of burghers, the defendant's admission was produced, and it appeared that five persons were included in one admission which was stamped, but four other blank papers regularly stamped were annexed to it: this was adjudged to be bad; for that each admission should be distinct and properly stamped.

2. "As the revenue is the object of the stamp-duties, though every distinct instrument has a distinct stamp, yet if the amount of the duty is paid, the court will admit an instrument to be given in evidence, though not stamped with the proper stamp which such instrument requires."

For where in *assumpsit* for use and occupation, the defendant offered in evidence a demise by deed of the premises in question, which would have nonsuited the plaintiff under stat. 11 Geo. 2. c. 19.: on being produced, it was not stamped with the stamp required for leases; but was on an agreement-stamp: for this it was objected to; but it was answered, That the stamp for leases was a six shilling stamp, and that for agreements of the same amount; and that therefore the amount of the stamp-duties being satisfied, that that was sufficient: the judge was of that opinion, and admitted it to be given in evidence.

Allen v. Thomas  
Sum. Aff.  
Maidstone,  
1791.  
Coram Gould  
Just. MSS.

3. "Though parol evidence may be sufficient of any matter or agreement, yet if the party will reduce it into writing it cannot be given in evidence, unless it is stamped."

For where a written agreement in these words: "*A. doth let and sell to B. for the term of three years,*" was offered in evidence in an action of *assumpsit* on a special agreement, the defendant objected to its being read, because it was a lease and not stamped: for the plaintiff it was said, that it was only a memorandum of a parol lease, which being for three years only is good as such; and the statute in using the words "indenture, lease or deed poll," meant only deeds: but it was holden, That though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp, otherwise the court are inhibited from receiving it in evidence.

Proffer v. Phillips.  
Hereford Sum.  
Aff. 1765.  
Coram Perrot.  
Baron.  
Bull. N. P.  
269.

4. By stat. 1 Ann. stat. 2 Car. 22. f. 2. "Persons are forbidden to write again on a paper before stamped and written on, unless such paper shall be re-stamped, or to erase or change the name, or affix another piece to a stamp used before, under a penalty," &c. &c.

Under this statute it has been held,

That where a person gave a letter of attorney to two persons therein named, to receive money for him in *Newfoundland*; that they did not receive it, but applied merely for payment; upon which the person erased the names of the persons so before appointed attorneys, and put another in their stead to receive the same money and from the same person: it was held that this was within the penalty of the statute.

Stonelake v.  
Babb.  
5 Burr. 2673.

But

Rex v. Bishop  
of Chester.  
1 Stra. 625.

But when the penalty is paid and it is then stamped, it may be given in evidence.

5. "As to how stamped copies may be given in evidence."

Den v. Fulford.  
Per Lord  
Mansfield.  
2 Burr. 1181.

There are two sorts of copies of proceedings; a *close copy* which might be given in evidence in another court, and *office copies* which are equivalent to the record itself when made use of in the same court in the same cause; the office-copy is fixed to a certain number of words in a sheet, in order to ascertain the officer's fees; but copies to be given in evidence might be written as close as the writer pleased; the stamp acts mean to prevent any frauds in the office-copies by the parties compounding with the officers for their fees, and then writing a more than usual number of words in them, but did not mean to fix close copies to any number of words in a sheet.

## 2. OF THE RULES ADOPTED BY THE COURT, UNDER WHICH EVIDENCE IS TO BE GIVEN.

Bull. N. P.  
298.

1. "The first rule of evidence is, That in every issue the affirmative is to be proved."

Ibid.

This rule is founded on the nature of things, as a negative cannot regularly be proved, and therefore it is sufficient to deny what is affirmed till it be proved; but when the affirmative is proved, the other party may then contest it by opposite proofs; for that is not properly the proof of a negative, but of a proposition totally inconsistent with what is affirmed.

Ibid.

As in trespasss, if the defendant be charged with a trespass generally, he need only make a general denial of the fact; but if the fact be proved, he may then prove another proposition inconsistent with the charge, as that he was at another place at the time, or the like.

"But to this rule is an exception of such cases, where the law presumes the affirmative; in which case the other party is put on proof to impeach it."

Bull. N. P.  
298.

As the law presumes that every man does his duty until the contrary is proved; therefore in an information against Lord Halifax, for refusing to deliver up the rolls of the auditor of the exchequer, the court put the plaintiff upon proving that he had not delivered them up.

Bull. N. P.  
298.

2. "A second general rule is, That no evidence need be given of what is agreed by the pleadings; for the jury  
"are



" are only to try the matter in issue between the parties, so that nothing else is properly before them."

As in *replevin*, the defendant avowed the taking the cattle in the *locus in quo*, as parcel of his manor of *K*: the plaintiff replied, That it was parcel of the manor of *K*, and made title to it, and traversed that the manor of *K* was the freehold of the defendant. At the trial he was not admitted to prove that *K* was no manor, for that was admitted in the pleadings, and the issue was to whom it belonged.

" So the jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary."

As in *trespass* for throwing down and carrying away stalls: As to all the trespasss, except the throwing down, the defendants pleaded not guilty; and as to the throwing down, they pleaded a special justification, and therein justified both the throwing down and the carrying away: on issue joined, the judge at the assizes would not try whether the defendants were guilty or not of the carrying away, because they had confessed it by their justification: and on a motion for a new trial, the court held the judge's directions to be right; for the jury could never find the defendants to be not guilty of that which they had confessed on the record, though in another issue.

" But there may be a matter on the face of the pleadings which may be an estoppel to the party to aver against it; but which nevertheless the jury shall not be concluded by."

As in debt on a bond of intestates by the administrator, bearing date 4th of April, 1572, the defendant pleaded that the intestate was dead before the date of the bond, and *non est factum*: on issue joined, the jury found that the bond was delivered 30th of July 1571, and that the intestate was then living: the court held, That though it was an estoppel as between the parties to aver against the deed, yet it was none as to the jury, who were sworn to find the truth; and the plaintiff had judgment. Note, It was agreed in this case, that the date of the deed was not of the substance of it; for if there be no date, or a false or impossible date, as 30th of February (*ex gr.*) yet that the deed was good.

3. " A third general rule of evidence is, That wherever a man cannot have advantage of any special matter, by pleading

"pleading that he may give it in evidence under the general  
"issue."

Alfop v. Price.  
Douglas 155.

As where in debt on a bond and plea of bankruptcy, the plaintiff offered the condition of the bond in evidence, to shew that the debt was not barred by the bankruptcy (it being a bond not then due or payable); this was objected to, on the ground that the declaration was general; and the plea admitted the bond as stated, and so not in issue; and that if the plaintiff intended to have relied on the condition, that he should have pleaded it: but it was resolved, That the evidence was good and admissible; for pleas of bankruptcy under stat. 5 Geo. 2. always conclude to the country, so that the plaintiff had no opportunity to put the condition on the record; and therefore, as he could not have advantage of it by pleading, that he should be admitted to give it in evidence.

Co. Litt. 283.

So no man can justify the killing of another; therefore he may give the special matter in evidence.

1 Jones 240.

So in trover the defendant may give a special justification in evidence, because he cannot plead it: *aliter* in trespass where he can.

Bull. N. P.  
293.

4. "A fourth general rule of evidence is, That the best  
"evidence which the nature of the thing admits and is capable of, must always be given."

Bull. N. P.  
ibid.

The true meaning of this rule is, That no such evidence shall be brought, that *ex natura rei* supposes still better evidence behind in the parties power or possession; for such evidence is altogether insufficient and proves nothing, as it carries a presumption contrary to the intention for which it is produced; for if the other greater evidence could make for the party, why was not it produced?

Bull. N. P.  
294.

This rule therefore consists of two parts: 1st, It must be the best evidence: 2. It must be in the party's possession or power; for if not, it is not his default that it is not produced: therefore, where any deed or other instrument appears to be lost, without any fault in the party, In such case a copy is good evidence.

1. "Therefore, no parol evidence of any fact or agreement shall be admitted where there is written evidence  
"of such fact; for written evidence speaks for itself, is  
"liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain and fallible."

It is therefore the constant practice at *Nisi Prius*, in case a witness mentions any matter which has been reduced into writing, to call for the writing; and if not produced, or not proved to be lost, to reject evidence of such matter or fact.

“ So upon the same ground, and under the statute of frauds, where any written evidence is produced, parol evidence is never admitted to add to or vary it in any respect.”

As where in trespass the case was, that the plaintiff being possessed of two closes, called *Millcroft* and *Boreham's Field*, came to an agreement in writing with the defendants, to give them the grass and hay off *Boreham's meadow* in exchange for their copper-mill, &c. the trespass was committed by the defendant's entering on *Millcroft*: at the trial, parol evidence was admitted, to prove that at the time it was agreed between the parties, that beside *Boreham's Field*, the defendant was to have the possession and soil of *Millcroft*; and the defendant had a verdict: the court set the verdict aside, such evidence being against law. Meres v. An-  
fel & alt  
3 Will. 275.

So where upon *plene administravit*, the question was, a man gave “ to his brother *John* (the testator) 1000l. and in case of his death, to his wife *Susannah* :” *John* survived the testator, and the wife (the defendant) received the legacy; the plaintiff insisted that the 1000l. vested absolutely in *John*, and so was assets in her hands: she offered parol evidence, to prove that the testator in extremis declared that he meant only to give the interest of it to his brother for life, and that she should have the principal in case she survived him: *Ch. Just. Lee* rejected the evidence.—*Vid. Preston v. Merceau*, ante fol. 20. *Gunnis v. Erhart*, ante fol. 12. and *Finney v. Finney*, 1 Will. 35.: all which cases establish the same point. Lowfield v.  
2 Stra. 1261.

However, in this case, in which the question was concerning the settlement of a pauper by purchase of a tenement, the consideration expressed in the deed was 281; the court were of opinion, That it was admissible to give evidence, that in point of fact 301. had been paid. Rex v. Inhab-  
itants of Scam-  
monden.  
3 Term Rep.  
474.

In some cases however of written evidence, parol evidence is admitted to explain it, as in rule *postea*.

2. Under this ground of the best evidence being always required, copies of any instruments or proceedings are not admissible evidence, except in some particular cases, as the originals are the best evidence. Bull. N P.  
294.

Therefore

Tillard v.  
Shebbeare.  
2 Will. 366.

Therefore where in a question on a presentation by a patron to a living, a copy from the bishop's institution-book was held not to be sufficient evidence; for it was not the best evidence that could be had: the presentation under the hand and seal of the patron was better evidence, so was the institution-book itself.

But in the following cases, copies are admissible.

Bull. N. P.  
294.

1st. If the *original is proved to be lost or destroyed* (ante fol. 177); for then in fact the copy is the best evidence.

Ibid.  
Per Ld. Mansfield.  
4 Burr. 2488.

2. If the *original is proved to be in the hands of the opposite party*, in such case a copy may be given in evidence, if such party refuses to produce it upon notice given to do it; or in such case parol evidence may be given of its contents.

4 Burr. 2488.

It has however been said, that there is a difference in civil and criminal cases or penal actions; as to the necessity that a party is under to produce evidence against himself on his receiving notice to do it; and it has been doubted whether in the latter cases a party is obliged to do it; but however, all distinction as to that is completely over-ruled by the following case:

Attorney General v. Le  
Merchant.  
Cit.  
2 Term Rep.  
201.

This case was an information grounded on stat. 7 G. 1. c. 21. for importing tea into *Guernsey*, which had not been first loaded and shipped in *Great Britain*; in the course of the trial the *Attorney General* offered to give in evidence copies of letters from the defendant to one *Chambers*, who was the witness for the crown respecting the tea; but which letters were then in the defendant's own possession, *Chambers* having become a bankrupt; and by an order of the *chancery*, all his papers having been seized, and delivered up to the defendant; but while they were in the hands of the clerk to the commission, the solicitor for the excise had contrived to get copies of them: at the trial the objection was taken to the reading them, on the ground that this was a criminal prosecution, and that therefore the defendant was not bound to produce this evidence against himself: but the objection was over-ruled by Baron *Eyre*; and on a motion for a new trial, the court was of the same opinion; so that now there is no distinction in this respect between civil and criminal cases.

Per Buller Just.  
2 Term Rep.  
201.

Per Holt.  
3 Salk. 154.

2. "A second case in which a copy is admissible evidence, is where the *original is of a public nature*; for wherever the original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof is evidence." As,

1. *A copy of the Journals of the House of Lords* respecting the reversal of a decree, was in this case adjudged to be good evidence. *Jones v. Randall*.  
Cowp. 17.  
Douglas 572.  
*in not.*

2. *Sworn copies of the entries in the Journals of the House of Commons* were produced as evidence on the part of the crown, and admitted. *Rex v. Lord G. Gordon*.  
Douglas 569.

3. *Copies from the transfer-books of the East India Company* have been held to be good evidence. *Ibid. in not.*

4. *Poll-books at an election* are of a public nature, and a copy of them shall be evidence: on a suggestion of fraud or rature only shall the originals be produced. *Brocas v. Mayor of London*.  
1 Stra. 387.

5. *The city books*, in which are entered the boundaries of the public markets, are books of a public nature, and copies of them are evidence. *Warrener v. Gils*.  
2 Stra. 954.

3. "A third case in which copies are evidence, is where they are made *so by statute*."

1. As under stat. 5 Geo. 2. c. 30. "By which the depositions, proceedings, &c. under commissions of bankruptcy are ordered to be recorded, and that copies of them shall be evidence." *Janson v. Wilson*.  
Douglas 244.

2. By stat. 16 Geo. 2. justices of peace are impowered to summon any soldier having a wife or child before, and to cause him to make oath as to his last place of legal settlement; a copy of which affidavit, properly attested, shall be evidence of the place of settlement, stat. 32 G. 2. *3 Term Rep.*  
712.

4. But copies are to be given in evidence, under the following restrictions:

1. If a copy of a deed or such like instrument is offered in evidence, on the ground of the original being lost, it must be proved by a witness who compared it with the original, otherwise there would be no proof of the truth of the copy, or that it had any relation to the deed. *1 Mod.* 4.

2. Where a copy is in like manner offered in evidence, sufficient probability must be shewn to the court to satisfy them that the original was genuine, as well as that it was lost, before the party shall be admitted to read it. *Goodier v. Lake*.  
1 Atk. 446.

3. "But notwithstanding the rule is thus generally laid down, yet in some instances the court have admitted an inferior species of evidence."

As in this case, which was an action against an officer of the Post-Office for interfering in an election, the court were of opinion that the evidence was sufficient. *Crew v. Saunders*.  
3 E. of 2 Stra. 1005.

of opinion, That it was sufficient for the plaintiff to shew the *defendants' acting as such*, without bringing proof of his being appointed by the *Post-office*.

Radford *q. t.*  
v. Macintosh.  
3 Term Rep.  
632.

So in an action by the plaintiff under stat. 27 G. 3. c. 26. for the penalties under the *Post-horse duty*, brought by the farmer, it was held not necessary for the plaintiff to give in evidence his appointment by the Lords of the Treasury, or by the commissioners of the stamp-duty; it is sufficient proof if the *defendant has accounted with the plaintiff as farmer of the duties, and paid him as such*.

Bevan *q. t. v.*  
Williams.  
3 Term Rep.  
635. in not.

So in an action against the defendant for non-residence, the plaintiff is not called upon to prove admission, institution, and induction, in order to maintain his action; it is sufficient for him to prove *the several acts done by the defendant as parson*; as receiving the tithes, serving the church, &c.

5. A fifth general rule of evidence is, "That *hearsay* is "no evidence."

Bull. N. P.  
294.

For as evidence upon oath is only admissible in a court of justice, the first speech being without oath, the oath of another only going to prove that it was said, proves but a bare speaking, and so is of no weight or importance; besides, if the person who spoke the first words be living, what he has been heard to say is not the best evidence.

2 Mod. 283.

Ibid.

But 1st, Though *hearsay* be not allowed as direct evidence, yet it may be admitted in corroboration of a *witness's testimony*, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; but this is not evidence in chief; and it is doubtful if it is so in reply.

Holliday v.  
Sweeting.  
M. 16 G. 3.  
Bull. N. P.  
294.

But what a party has himself been heard to say respecting the matter in dispute, is good evidence against himself; as in the case of the admission of a debt *ex gr.* so are conversations which have passed in the hearing of the party respecting the matters in difference, and which were uncontradicted or admitted by him, good evidence; as is the constant practice at *Nisi Prius*.

2. "Where positive proof is not to be had, the declarations of persons uninterested, and who are then dead, are admissible."

Bull N. P.  
294.  
Per Lord  
Mansfield.  
Comp. 594

1. As in questions concerning legitimacy; for it is the practice to admit evidence of what the parents have been heard to say respecting their being married or not; for the presumption arising from cohabitation is strengthened or destroyed by such declarations, which are not to be given in evidence

evidence directly, but as reasons for the witnesses belief one way or the other.

2. So hearsay is good evidence in cases of pedigree, as so Grimwade v. proves who was a man's grandfather; what children he had; Stephens, in when he married, &c. of which it is reasonable to presume Kent, 1697. that better evidence could not be had; for matters of no Bull. N. P. direct importance, such as those now mentioned, are only 294. known by reputation; for no written memorial of such matters is usually kept.

As in this case, which was an ejectment; Mr. Sharp who Duke of Athol was attorney in this cause, was admitted to give evidence v. Ashburnham. what a Mr. Worthington had told him he heard and knew re- E. 14 G. 2. specting the pedigree of the family, Mr. Worthington then Bull. N. P. 324. being dead.

In ejectment, evidence was given that one James Hasland Rowe v. (whose title if living or that of his issue would supercede Hasland. that of the lessor of the plaintiff) was living, a poor labour- 1 Black. Rep. ing man at Liverpool, sixty years ago; five witnesses deposed 404. that they believed he was dead without issue, but knew nothing certain; the plaintiff produced the register of Wal- sham, to show that one James Hasland was buried in 1707; but this name plainly appeared to have been altered from Harrox, but by whom or where did not appear: Justice Clive left it to the jury to decide, whether Hasland died without issue or not: and the jury found for the plaintiff. On a mo- tion for a new trial, per. Ld. Mansfield; in establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew that the person has not been heard of for many years, to put the op- posite party upon proof that he still exists. Many persons go to the East and West Indies, and are never heard of again: what is done on such a trial is no injury to the man or his issue, should they ever appear, and claim the estate; it was proper evidence to be left to the jury, and the rule for a new trial was discharged.

3. "Hearsay is good evidence to prove the death of any re- Bull. N. P. laxian beyond sea," as a person living to prove that he had 294. heard in the family that such a person of it had died abroad, and that it was believed in the family, and that such a person died without issue; and such shall be sufficient to entitle the person next in remainder. Roe ex dim. Ellerbook v. Clerk. Sixt. Hill. 1791. MSS.

4. "Hearsay is evidence in cases of settlement of pau- 24. pers."

*Rex v. Nutley.*  
Bott. Sett. Cal.  
234. Cit.  
3 Term Rep.  
715.

As where on an appeal the evidence was that *the husband* of the pauper *told her* that he had been hired to one *Smith*, but had been turned away to prevent his gaining a settlement, the sessions rejected the evidence as mere *hearsay* and inadmissible: on the case coming before the court of *King's Bench*, they held clearly, That it ought to have been admitted.

*Rex v. Greenwich.*  
Bott. Sett. Cal.  
281. Cit.  
3 Term Rep.  
716.

The order stated, That the pauper was the daughter of *George Wall* deceased, *who in his lifetime had declared to the witness* that he was settled in *Greenwich*, by hiring and service to a *Captain Saunders*; and the order was affirmed on this evidence of the declarations of the father alone; and it was held to be good.

*Rex v. Holy Trinity, in Wareham.*  
Caldec. Sett. Cal.  
141.

In this case the doctrine above was admitted and established, and the court went still further, admitting the wife to give evidence of her husband's declarations as to his settlement, *he then being abroad and living.*

5. "Another case in which hearsay is evidence, is whether *"parcel or not parcel?"* *Vid. ante Davis v. Pearce, 2 Term Rep. 53. and Holloway v. Raikes, ibid. cit. Ch. of Ejection.*

6. "In questions of *prescription*, hearsay is good evidence "in order to prove a general reputation."

*Skinner v. Lord Bellamont.*  
Worcester,  
1744.  
Bull. N. P. 295.

As where the issue was on a right of way over the plaintiff's close, the defendant was admitted to give evidence of a conversation between persons not interested then dead, wherein the right to the way was agreed.

7. "What commences by parol may be transmitted by parol, and that creates a general reputation; in which case hearsay is admissible evidence."

*Bishop of Meath v. Lord Belfield, 1747.*  
Bull. N. P. 295.

In a *quare impedit*, the plaintiff derived his title from *Ld. R.* in whom he laid a presentation of one Knight: the bishop set up a title in himself, and traversed the seisin of *Lord R.* the plaintiff gave in evidence an entry in the register of the diocese, of the institution of Knight, in which there was a blank in the place where the patron's name is usually inserted, and then offered parol evidence of the general reputation of the country, that Knight was in by presentation of *Lord R.*: upon a bill of exceptions this came on in *K. B.* when the better opinion was, That the evidence was admissible, the register which was the proper evidence being silent; for a presentation may be by parol, and what so commences may be transmitted to posterity by parol, and that creates a general reputation.

8. "And



8. "And on this head it is in general to be observed, that it is no objection to the admission of hearsay evidence, that the party whose declarations are brought as hearsay evidence, would himself be an inadmissible evidence, provided such declarations at the time were indifferent, and used without reference to the question then before the court."

As where the question was respecting the boundaries of the parish of *Alton* and the hamlet of *Hammer-smith*, a witness for the defendant proved that an old man, now dead, had told him twenty years before, respecting the boundaries of these parishes, but the old man had been an inhabitant of the hamlet of *Hammer-smith*; this evidence was objected to, because the person who had made the declaration was interested: but Lord Mansfield ruled it to be good evidence; for at the time the conversation took place, there was no question or dispute about the matter, nor could it be supposed that a man would hold a conversation, in order to make it evidence twenty years after.

Rex v. Inhabitants of Hammer-smith. Sitt. West. Hill. 1776. MSS.

5. "Under the last rule it was observed, That parol evidence could in no case be admitted to explain written; but it is a rule of evidence, that where there is a doubt on the face of the words respecting the matters to which they refer, in such case parol evidence may be admitted to ascertain such facts."

Bull. N. P. 297.

This *ambiguitas*, or doubt of the construction, is divided by Lord Bacon into *ambiguitas latens* & *patens*.

*Ambiguitas latens* is that which seems certain, and without doubt for any thing which appears on the face of the deed or instrument; but there is some collateral matter out of the deed or instrument which creates the ambiguity.

"Where the ambiguity is of this nature, parol evidence is admissible, for the instrument itself being certain, but the doubt arising from something extrinsic, extrinsic matter should be admitted, particularly as it fortifies and gives effect to the written evidence."

"But where any implication or construction of law arises from any written evidence whatever, parol evidence may be admitted to explain that implication; for that is not to alter the written instrument itself."

As where a fine is levied if no uses are declared, the resulting uses shall be to the conusor; but parol evidence is admissible to rebut the presumption of such resulting uses.

Roe v. Popham. Dougl. 24. Lord Altham v. Lord Appleton. Cit. Dougl. 26.

So

Brady v. Cubitt.  
Doug. as 30.

So the implied revocation of a will by a subsequent marriage and birth of a child, is liable to be rebutted by parol evidence.

Lake v. Lake.  
8 Nov. 1751.  
Bull. N. P. 297  
2 Atk.  
1 Will. 323.

So where a man devised four hundred pounds to his wife, and made her executrix without disposing of the surplus; Lord Hardwicke admitted parol evidence to shew the testator meant his wife should have it; for there was no ambiguity in the will, nor was it to alter the apparent intent of the testator; for by law she was entitled to the surplus as executrix, and therefore the evidence was only to rebut the equity.

Brown v. Selwin, in Dom.  
Proc.  
Bull. N. P. 297.

But in this case, the testator having expressly devised the residue of his personal estate to his executors, one of whom owed him money on bond, parol evidence was refused to be admitted, to prove the testator meant to extinguish the bond-debt by making the obligor executor; for that would have been to alter the apparent intent, and not merely to rebut an equity.

Jones v. Newman.  
Tria. 24 G. 2.  
Bull. N. P. 296.  
1 Black. Rep. 60.  
Cheney's case.  
5 Co. S. P.

As where the testatrix devised her estate to her cousin John Cleere, and there was both father and son of that name: it was held that parol evidence was admissible to prove that the son of that name was the person meant; for as the objection arose from parol evidence, parol evidence ought to be admitted in answer to it.

2 Roll. Ab. 676.

So if a man has two manors of the same name of Dale, and he levies a fine of the manor of Dale generally; parol evidence and circumstances may be given in evidence, to shew which manor he intended; for that would not be to contradict the record, but to support it.

Bull. N. P. 297.

*Ambiguitas patens* is that which appears on the face of the deed or instrument, and is in fact an omission, and can therefore never be supplied by an averment; for that in effect would be to make that pass without deed, which the law appoints shall not pass without deed.

Baile & Church  
v. Attorney  
General.  
2, Jan. 1714.

As where there was a devise in a will, but the devisee's name was totally omitted: it was held that parol evidence was inadmissible to shew what was meant; for that would be to add to a written instrument.

6. A sixth general rule of evidence is, "That in all cases where general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally."

2. "It therefore often becomes doubtful whether general character is so put in issue or not."

In this case, which was a bill filed by a kept-mistress for an annuity, the defendant in his answer, said, "That she was a woman of infamous character before Mr. *Perians* became acquainted with her;" this was holden to be a sufficient putting of her character in issue to enable the defendant to prove particular facts.

*Clarke v. Paris*.  
ans.  
27 July, 1742.  
Bull. N. P.  
295.

But where to a bill brought by the wife, the husband in his answer, said, "She had not behaved herself with duty and tenderness to him, as became a virtuous woman, much less his wife;" this was holden not to put adultery in issue, so as to enable the husband to prove particular facts.

*Lord Doneraile*  
*v. Lady Doneraile*, in *Dem.*  
Proc. 1734.  
Bull. N. P.  
296.

2. In actions for criminal conversation, the defendant may give in evidence particular facts of the wife's adultery with others, or having a bastard before marriage; for by bringing the action the husband puts her general character and behaviour in issue, and as the defendant may examine as to particular facts, *a fortiori* he may call witnesses to her character.

*Roberts v. Malton*.  
*Per Willes*,  
C. J. at  
*Hereford*, 1745.  
Bull. N. P.  
296.

3. In criminal prosecutions, where the defendant's character is put in issue by the prosecution, the prosecutor may examine so particular facts; for it is impossible without it to prove his charge.

Bull. N. P.  
ibid.

An exception to this is the case of *indictments for barratry*, in which case the prosecutor cannot examine as to particular facts, without giving previous notice of it to the defendant; for these prosecutions being commonly against attornies, whose profession it is to follow law-suits, and it is difficult to draw the line between that and acting as a barrator, it is therefore required that the defendant should know what particular facts are to be given in evidence, in order that he may be prepared to shew that he was fairly and professionally employed in these things.

Bull. N. P.  
ibid.

But in other criminal cases, the prosecutor cannot enter into the defendant's character, unless the defendant enable him to do so, by his calling witnesses in support of it, and even then the prosecutor cannot examine to particular facts; the general character of the defendant not being put in issue, but coming in collaterally.

Bull. N. P.  
ibid.

4. In an ejectment by an heir at law, to set aside a will for fraud, and imposition committed by the defendant, he shall not be permitted to call witnesses to prove his general good character.

*Goodright ex*  
*dim. Farr v.*  
*Hicks*.  
*Winton Sum.*  
*Aff.* 1789.  
*Coram Buller*,  
*Just.*

5. As to how far the characters of witnesses may be questioned on trial, it is settled,

Bull. N. P. 296. 1. If you will impeach the credit of a witness, you can only examine into his general character, and not to particular facts; for every man is supposed to be capable of supporting the one; but it is not likely he should be prepared to answer the other without notice: and unless his general character and behaviour be in issue, he has no notice.

Hardwell v. Jarman.  
Taunton Lent Ass. 1789.  
Coram Buller, J. to deny. But other witnesses may be called to impeach his credit respecting any matter relative to the issue; for whatever is material to the issue, each party must come prepared to prove or deny.

Hastings's case.  
Per Lord Thurlow Chanc. 11 June, 1789.  
In Dom Proc. Bull. N. P. 297. But a party shall never be permitted to bring general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit, if he spoke against him.

Bull. N. P. 297. But if a witness proves facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness; but the impeachment of his credit is incidental and consequential only.

Per Ashurst, J.  
Taunton Sum. Ass. 1773. after consulting with Baron Adams.  
Bull. N. P. 297. If a particular fact go to the competency of a witness, it may be proved by other testimony; as the copy of a record for perjury, felony, &c. so of an interest in a witness in the event of a cause: and whether he be interested or not, shall be decided by the judge.

9. The last rule of evidence is this "That if the substance of the issue be proved, it is sufficient."

This rule depends upon ascertaining how far the words *modo & forma* used in joining issue is of the substance of the issue; for where it is so, it must be proved.

To ascertain this, an attention to the point really to be tried between the parties, seems to be the best rule.

Co. Litt. 282. As in an action of waste for cutting *twenty asses*, proof that the defendant cut *ten* is sufficient; for the issue is waste or no waste.

2 Roll. Ab. 706. But if the issue be whether "*Lord Delaware demised*" or not? proof that *A. B.* who was *not then but now Lord Delaware*, is not sufficient; for whether he were Lord Delaware at the time of the demise is the issue.

But however, the rule is thus laid down : 1st, That where the issue is joined on the point of the action, there *modo & forma* are mere form, and need not be proved.

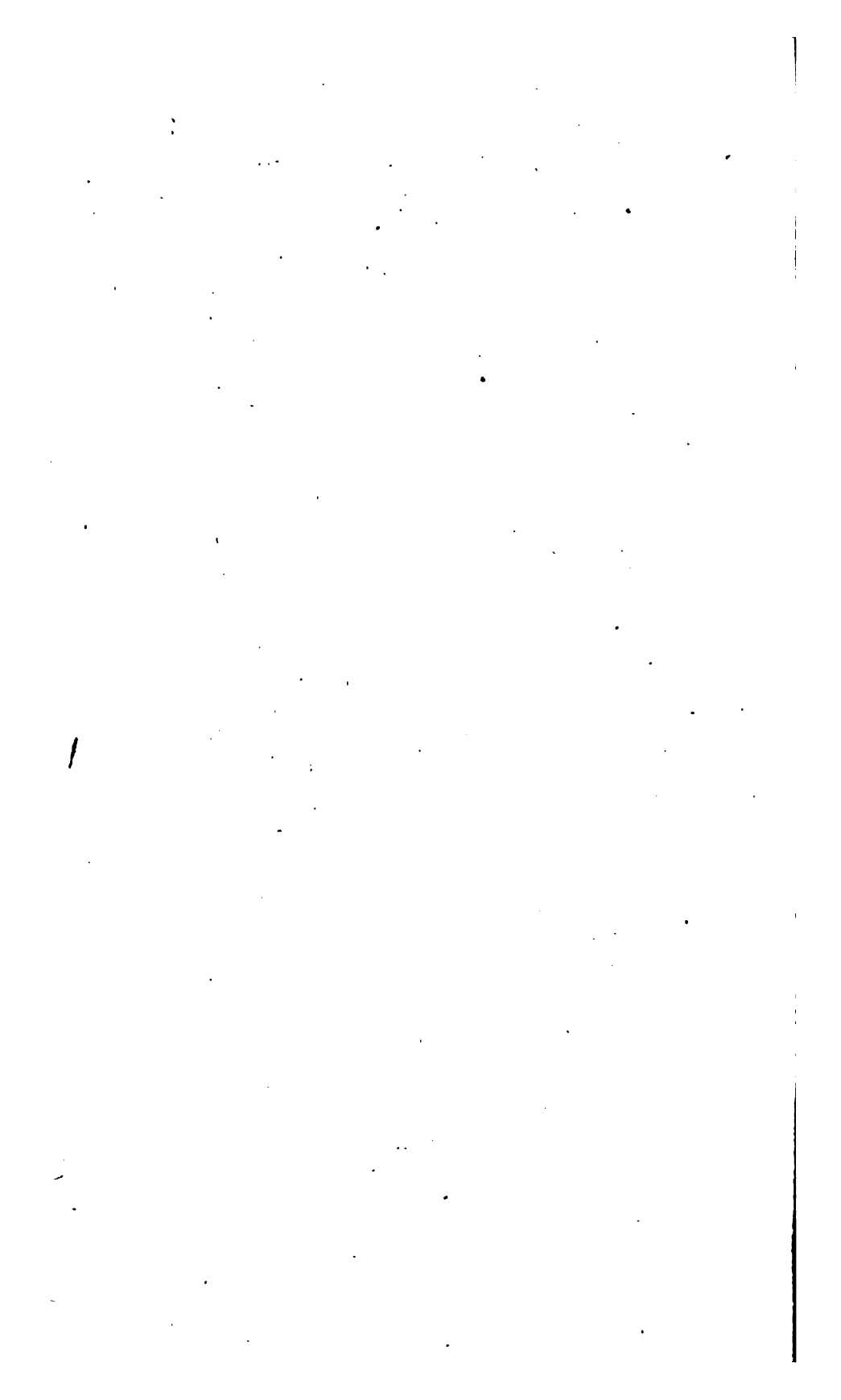
As where in *replevin* the defendant avowed the taking as a Pope v. Skinner. commoner, damage feasant, the plaintiff in bar said, that *I. S.* Hob. 72. was seised of an house and land whereto he had common, and had demised to him the 30th of March to hold from the Feast of the Annunciation next before for a year ; the defendant traversed the lease *modo & forma* : the jury found that *I. S.* made a lease on the twenty-fifth of March, to the plaintiff for one year ; and though this be not the same lease pleaded on account of the difference of the day, yet the plaintiff had judgment ; for the substance of the issue is, Whether the plaintiff had such a lease, by force of which he might use the common ? Yet it must not depart altogether from the form of the Bull. N. P. 200. issue, as if it had been found that he had a right of common by lease from another, that would have been bad.

2dly, " But where a collateral point in pleading is traversed - Co. Litt. 202. " ed, then *modo & forma* is of the substance of the issue, and " must be proved."

As if a feoffment be alledged by two, and this is traversed *Ibid.* *modo & forma*, and this is found the feoffment of one, there *modo & forma* is material.

So if a feoffment be pleaded by deed, and it is traversed *Ibid.* *absq. hoc quod feoffavit modo & forma*, the jury cannot find a feoffment without deed.

THE END.



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